No. 90-95

In The Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Appendix

---

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

JAMES B. GAINER
Assistant Attorney General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43266-0573
(614) 466-4397

Attorneys for Petitioners,
The Public Utilities Commission of Ohio, *et al.*

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in concluding that a provision of the Federal Railroad Safety Act, 45 U.S.C. § 434, may be construed as the express intention of Congress to preempt Ohio statutes and administrative regulations that are expressly preserved by the federal Hazardous Materials Transportation Act, 49 U.S.C.App. § 1811(a).

LIST OF PARTIES

The Public Utilities Commission of Ohio, and,
Jolynn Barry Butler, Chair
J. Michael Biddison, Commissioner
Ashley C. Brown, Commissioner
Richard M. Fanelly, Commissioner
Lenworth Smith, Commissioner,
in their respective capacities as Chair and Commissioners of the Public Utilities Commission of Ohio

CSX Transportation, Inc.
Consolidated Rail Corporation
Norfolk and Western Railway Company
Grand Trunk Western Railroad Company

AMICUS CURIAE

The State of Washington
The State of Tennessee
The State of Texas
The State of Oregon
The State of Nevada
The State of Missouri
The State of California

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit issued on April 13, 1990.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit, issued on April 13, 1990, is reported at 901 F. 2d 497 (6th Cir. 1990). The judgment and opinion in the original action giving rise to this Petition was issued by the United States District Court for the Southern District of Ohio, Eastern Division, on December 12, 1988, and is reported at 701 F. Supp. 608 (S.D. Ohio 1988).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Sixth Circuit was issued on April 13, 1990.

STATUTORY PROVISIONS AT ISSUE

The relevant portions of the Hazardous Materials Transportation Act (HMTA), 49 U.S.C.App. §§ 1801 *et seq.*, and the Federal Railroad Safety Act (FRSA), 45 U.S.C. §§ 421 *et seq.*, are reproduced in full in the proceeding Statement and Reasons For Granting the Writ.

STATEMENT

Thousands of tons of highly toxic or explosive "hazardous materials" are transported through the communities of this Nation on a daily basis. Accidents do happen. One recent railroad disaster near Miamisburg, Ohio ignited a rail car of phosphorous, spreading a cloud of toxic gas throughout the area and causing the evacuation of 40,000 state citizens. *See CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 701 F. Supp. 608, 610 (S.D. Ohio 1988).

In 1974, Congress recognized the inherent problems of regulating these dangerous substances that are moved by several different modes of transportation, and called upon the states for help in enforcing the federal standards. The federal Hazardous

Materials Transportation Act (HMTA) requires that the transport of hazardous materials, by any mode of transportation, be regulated on an "intermodal" basis:

> It is declared to be the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.

49 U.S.C.App. § 1801.

> 'hazardous material' means a substance or material in a quantity and form which may pose an unreasonable risk to health and safety or property when transported in commerce;
>
> 'transports' or 'transportation' means any movement of property by any mode, and any loading, unloading, or storage incidental thereto.

49 U.S.C. § 1802(2), (6).

Further, the HMTA establishes a dual system of federal and state regulation, specifically preserving state laws that are consistent with the HMTA, and requiring that federal preemption questions be determined under the HMTA:

> (a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.
>
> (b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement

> shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

49 U.S.C.App. § 1811(a), (b).

Following the Miamisburg disaster, the State of Ohio undertook a detailed study of federal enforcement of the intermodal hazardous materials regulations under the HMTA and found federal enforcement to be inadequate. *CSX*, 701 F. Supp. at 610. Pursuant to the express requirements of the federal HMTA, on September 26, 1988, the Ohio General Assembly enacted the Ohio Hazardous Materials Transportation Act, providing that:

> The public utilities commission may adopt safety rules governing the transportation and offering for transportation of hazardous materials by railroad. *The rules adopted under this section shall be consistent with, and equivalent in scope, coverage, and content to, the provisions of the 'Hazardous Materials Transportation Act,'* 88 Stat. 2156 (1975), 49 U.S.C.A. 1801, as amended, and regulations adopted under it. No person shall violate a rule adopted under this section or any order of the commission issued to secure compliance with any such rule.

Ohio Rev. Code Ann. § 4907.64 (emphasis added).

On December 10, 1988, the Public Utilities Commission of Ohio adopted the federal hazardous materials administrative regulations, promulgated under the federal HMTA, in order to provide for state enforcement of the intermodal federal rules:

> For the purpose of enforcing federal rules for railroads and shippers by railroad, the commission hereby adopts those portions of the hazardous materials transportation regulations contained in Title 49, Parts 171 through 179, CFR, as are applicable to transportation or offering for transportation by railroad including future modifications or additions. These federal rules shall be applicable to all railroads operating within or through this state, their agents and employees, as well as to any person offering hazardous materials for transportation within or through this state by

> railroad. *These federal rules shall be enforced so as to impose no operating requirements upon railroads or shippers by railroad to which these person have not been made subject under federal rules.* Enforcement of these federal rules shall be subject to any exemptions granted by the U.S. department of transportation pursuant to Title 49, Part 107, CFR, and shall be consistent with interpretations issued by the research and special programs administration, U.S. department of transportation.

Ohio Admin. Code § 4901:3-1-10 (emphasis added).

On December 12, 1988, the United States District Court for the Southern District of Ohio, Eastern Division, granted summary judgment to the plaintiff railroads, finding the Ohio statutes and regulations to be preempted by the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434. Specifically, the District Court held that the FRSA preempted Sections 4905.83 and 4907.64 of the Ohio Revised Code, and Sections 4901:2-7-01 through 4901:2-7-22 and 4901:3-1-10 of the Ohio Administrative Code, and permanently enjoined the Public Utilities Commission of Ohio from enforcing the state laws. *CSX*, 701 F. Supp. at 617. The State of Ohio appealed.

On April 13, 1990, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, finding that the foregoing state administrative regulations and statutes were preempted by the general railroad safety requirements of the Federal Railroad Safety Act, and that preemption under such modal safety requirements did not frustrate the mandate of the federal HMTA requiring that the transportation of hazardous materials be regulated only on an intermodal basis. *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F. 2d 497 (6th Cir. 1990). The preemption provision of the FRSA provides that:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State

> requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Under the federal statutory scheme, the United States Secretary of Transportation (Secretary) is required to regulate the transportation of hazardous materials on an intermodal basis. 49 U.S.C.App. § 1804(a). Pursuant to this grant of authority, the Secretary has promulgated administrative rules applicable to all modes of transportation. *See* 49 C.F.R. §§ 171-79. The Secretary may delegate authority to *enforce* the intermodal regulations to the separate modal administrations comprising the Department of Transportation, such as the Federal Railroad Administration (FRA). 49 U.S.C.App. § 1808(c).

The modal administrations, including the FRA, are limited by statute to administering the statutory authority of the Secretary related to the general safety of the respective modes, and such enforcement authority as is delegated by the Secretary. *See, e.g.*, 49 U.S.C. § 103(c) (1982 & Supp. V 1987). For example, the FRA is limited to administering the "duties and powers related to railroad safety vested in the Secretary . . . and additional duties and powers prescribed by the Secretary." 49 U.S.C. §103(c) (1982 & Supp. V 1987). Thus, the FRA is responsible for exercising the Secretary's statutory regulatory authority related to railroad safety under the FRSA, and has promulgated general rail safety regulations applying only to railroad safety (49 C.F.R. §§ 200-268). Under the HMTA, the FRA is limited to *enforcement* of the intermodal regulations pertaining to rail transportation (49 C.F.R. §§ 171-179). Neither the Secretary, nor the FRA, has statutory authority to promulgate intermodal hazardous materials regulations under the FRSA. 45 U.S.C. § 431; 49 U.S.C. § 103(c) (1982 & Supp. V 1987). The Secretary is expressly forbidden from varying this statutory scheme of intermodal regulation and delegated modal enforcement authority. 49 U.S.C. § 103(d).

REASONS FOR GRANTING THE WRIT

I. The decision of the lower court conflicts with applicable decisions of this Court.

In order to find preemption in the case below, the lower court overruled the express requirements of a federal statute. The state statutes and regulations found to be preempted are *identical* to the federal HMTA and implementing federal regulations, providing only for state enforcement of the federal requirements.

Unlike the lower court, in enacting the HMTA, Congress recognized the impossibility of effective federal enforcement, given the incredible volume of hazardous materials transported in this country on a daily basis. Congress *invited and encouraged* state enforcement of consistent hazardous materials requirements. The HMTA preempts inconsistent state requirements, expressly preserves consistent state requirements, and provides a statutory means to resolve jurisdictional conflicts in the dual system of federal and state enforcement of intermodal hazardous materials requirements. The decision of the lower court has precluded any state enforcement, leaving to state citizens across the nation only the meager protection offered by an overburdened federal bureaucracy. *See CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 701 F. Supp. 608, 610 (S.D. Ohio 1988).

The purpose of federal preemption, as consistently held by this Court, is to avoid frustrating the purpose of Congress with a multiplicity of inconsistent state regulations. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986). In the case at bar, the federal and state regulations are identical, and the Ohio regulations expressly require consistent enforcement. Thus, the purpose served by the lower court's decision is not that of Congress; rather, it is the economic interest of the nation's railroads, hoping to avoid effective enforcement of the existing federal regulations.

A. In enacting the HMTA, Congress established a dual system of federal and consistent state regulation.

The HMTA expressly limits federal preemption of state hazardous materials laws to state requirements that are inconsistent

with the HMTA, or a regulation issued under the HMTA. 49 U.S.C.App. § 1811(a). Accordingly, the police power of the states to protect citizens through consistent regulation, or as in this case, enforcement of the federal regulations, is expressly preserved. 49 U.S.C.App. § 1811(a).

Congress confirmed this reservation of police power authority to the states by providing a statutory means within the HMTA to resolve jurisdictional tensions between the federal and state governments. In this regard, Congress authorized the Secretary, upon application of a state, to determine that even "inconsistent" state requirements might survive preemption, so long as such state requirements provide an equal or greater level of protection to the public and avoid placing an unreasonable burden on interstate commerce. 49 U.S.C.App. § 1811(b).

Thus, the manifest intent of Congress is clear on the face of the HMTA: avoid inconsistent state regulation, but foster the help of the states to consistently enforce the federal requirements in order to better protect the public. The decision of the lower court has frustrated this congressional purpose, and has violated the precedential decisions of this Court.

B. This Court has consistently held that preemption is precluded where a state acts within its sphere of authority under a dual system of federal and state regulation established by Congress.

As noted by this Court, the "critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). The lower court avoided answering this question by ignoring the intention of Congress expressed in the HMTA, and by attempting to distinguish the applicable decisions of this Court. The precedents established by this Court dictate a different result.

In *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986), this Court addressed the issue of federal preemption in the telecommunications industry. In order to determine the issue, the Court compared the general authority vested in the federal government to regulate interstate telecommunications, with a specific reservation of state *intrastate* regulatory authority. *Id.* at

369-70.[1] The Court held that the broad authority over interstate telecommunications conveyed to the federal government in the "declaration of purpose" provision of the Communications Act could not be construed to supersede an express reservation of state authority. *Id.* at 370. Further, the Court found in *Louisiana* that jurisdictional tensions arising under the dual system of federal and state regulation should be resolved by reference to the statute itself, which both established the dual system of regulation, and provided a statutory process to resolve areas of conflicting regulatory jurisdiction. *Id.* at 375.

Despite the protestations of the telephone companies, hoping to avoid state regulation by asserting that the "federal purpose" of the statute to ensure national uniformity was frustrated by state regulation, the Court refused in *Louisiana* to impose federal preemption over the clear intent of Congress to preserve a measure of state regulatory authority. *Id.* at 370. The Court noted that a tangential relationship between federal and state regulation did not amount to an express intent to preempt. *Id.* at 375-76. With regard to the protestants, the Court had a short answer: "As we so often admonish, only Congress can rewrite this statute." *Id.* at 376.

In the case at bar, as in *Louisiana*, Congress has clearly expressed an intention to preserve the authority of the states to regulate. The only stricture placed by Congress upon the states' authority is that such regulation must be consistent with federal regulation. 49 U.S.C.App. § 1811(a). As was the case in *Louisiana*, in enacting the HMTA, Congress tempered its preemption by preserving a measure of state authority, and by including a statutory means to resolve jurisdictional tensions that might arise. 49 U.S.C.App. § 1811(a), (b).

---

1 The Court noted the relevant statutory provisions of the Communications Act of 1934:

> The Act establishes, among other things, a system of dual state and federal regulation over telephone service, and it is the nature of that division of authority that these cases are about. In broad terms, the Act grants to the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication," 47 USC § 151 [47 USCS § 151], while expressly denying that agency "jurisdiction with respect to . . . intrastate communication service . . . ." 47 USC § 152(b) [47 USCS § 152(b)].

Louisiana, 476 U.S. at 360.

Similarly, in *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), this Court found that the federal government had completely occupied the field of general safety regulation covering every aspect of nuclear energy generation. *Id.* at 212-13. Against the backdrop of complete federal preemption over "all matters nuclear," the Court examined the language and history of the controlling federal statute, and found an explicit congressional purpose to preserve traditional state authority to regulate the economics of energy production, including the production of nuclear energy. *Id.* at 213-17. In the face of a clear congressional intent to establish such a dual system of federal and state regulation, the Court concluded that federal preemption could not be imposed over the intent of Congress to preserve state regulatory authority. *Id.* at 216. In reaching this conclusion, the Court noted that an express reservation of state authority obviates any need to inquire into the tangential effects that state regulation might have on federal regulatory jurisdiction. *Id.*

Thus, this Court has examined statutory schemes similar to the HMTA, and has consistently held that broad preemption language, such as the FRSA preemption of state "laws relating to railroad safety," cannot be interpreted as overriding a specific statutory reservation of state authority. The HMTA clearly provides such an express reservation of state authority to consistently regulate the intermodal transportation of hazardous materials.

C. The decision of the lower court conflicts with the decisions of this Court in *Louisiana* and *Pacific Gas*.

The lower court declined to apply the decisions of this Court, based upon an illusory distinction. In this regard, the lower court found that:

> In this case, federal power to regulate transportation of hazardous materials is absolute; state power is limited. Thus, unlike *Louisiana Public Service* where the Court was concerned that '. . . a federal agency may preempt state law only when and if acting within the scope of its congressionally delegated authority,' 476 U.S. at 374, 106 S.Ct. at 1901, we have no qualms about the scope of the

> DOT's authority to promulgate hazardous material transportation regulations. The only question is whether the PUCO also may do so for railroads.
>
> In *Pacific Gas & Electric*, the state had express power to regulate the economics of nuclear production. 461 U.S. at 205-06, 103 S.Ct. at 1722-23. The federal law, the Atomic Energy Act, did not explicitly prohibit states from exercising economic regulation. The question before the *Pacific Gas & Electric* Court was whether federal regulatory authority over nuclear production preempted a state regulation which arguably came within the express state authority. Again, the question before us is different. The federal government clearly has the power to regulate all aspects of railroad safety; state power is limited. Thus, the HMTA does not present the same type of dual regulatory authority presented in *Louisiana Public Service* or *Pacific Gas & Electric*.

CSX Transp., Inc. v. Public Utilities Comm'n of Ohio, 901 F. 2d at 497, 502 (6th Cir. 1990). The effect of the lower court's analysis of *Louisiana* and *Pacific Gas* is to deny the states' historic police power, and limit the Court's decisions to the specific statutory schemes examined in those cases. No such limitation was imposed by this Court.

Rather, this Court has consistently emphasized that in reviewing preemption cases, courts must start with the *assumption* that the historic police power of the states is not to be superceded by federal enactments "unless that was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Clearly, an express grant of federal statutory authority to the states is not necessary to avoid preemption. The states' police power is assumed; the only relevant question is whether Congress has exhibited an intention to displace that police power.

Thus, regarding the applicability of the *Louisiana* decision, the lower court simply begged the question by noting that with respect to hazardous materials, "federal power . . . is absolute; state power is limited." *CSX*, 901 F. 2d at 502. In *Louisiana*, the decision of this Court turned upon the fact that Congress had specifically preserved state authority from preemption, not the fact that federal power

was limited by such a reservation of authority to the states. *Louisiana*, 476 U.S. at 373. The limitation on federal authority was examined in order to determine what authority Congress had reserved to the states. Thus, this Court noted that "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana*, 476 U.S. at 374.

Had the lower court *applied* the *Louisiana* test, a different result would have been reached. The "nature and scope" of the authority granted by Congress to the Secretary under the HMTA was limited to regulating the transportation of hazardous materials on an intermodal basis, and preempting inconsistent state regulations. *See* 49 U.S.C.App. §§ 1801, 1802, 1811(a). The FRSA clearly does not convey congressional authority upon the Secretary to either regulate the intermodal transportation of hazardous materials, or to preempt state requirements that are preserved by the HMTA. *See* 45 U.S.C. § 434; 49 U.S.C. § 103(c) (1982 & Supp. V 1987).

The lower court recognized that with enactment of the HMTA, "the regulation of the transportation of hazardous materials moved from a modal to an intermodal basis." *CSX*, 901 F. 2d at 500. Further, the lower court recognized that the "HMTA allows state regulations which are consistent with federal regulations." *Id.* at 501. Nonetheless, the lower court found preemption, and attempted to distinguish *Louisiana*, based upon the authority granted to the Secretary by the FRSA, a modal enabling statute applying only to railroad safety.

Contrary to the lower court's analysis, this Court found in *Louisiana* that like the HMTA, the Communications Act required a dual system of regulation in an area where federal and state jurisdictions necessarily overlap:

> However, while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction—in practice, the realities of technology and economics belie such a clean parceling of responsibility. This is so because virtually all

> telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably *within the jurisdiction of both state and federal authorities*. Moreover, because the same carriers provide both interstate and intrastate service, actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service, in the other "hemisphere."

Louisiana, 476 U.S. at 360 (emphasis added). Thus, the fact that "federal power is absolute" and "state power is limited" under the HMTA, has no bearing on the applicability of *Louisiana*. By limiting federal preemption to *inconsistent state laws*, Congress expressly preserved a measure of state police power authority to enforce consistent state requirements. In the case at bar, as in *Louisiana*, the "dual system of regulation" established by Congress applies to the joint regulation of one subject, defines the reach of federal jurisdiction, and preserves a measure of the states' police power to regulate that same subject. There is simply no basis for the lower court's conclusion that the system of regulation created by the HMTA "is of a different character than that at issue in *Louisiana*." *CSX*, 901 F. 2d at 502.

Similarly, in *Pacific Gas*, the fact that federal power was "absolute" had no bearing on this Court's decision. Specifically, this Court found that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas*, 461 U.S. at 212. Despite such "absolute" federal power, the Court declined to preempt state laws within the sphere of statutory authority reserved to the states by Congress. *Id.* at 213-16.

Further, in *Pacific Gas*, this Court expressly held that an affirmative grant of congressional authority to the states was not necessary in order to avoid preemption. The Court noted that although Congress had not affirmatively granted regulatory authority to the states, by reserving state authority to regulate the economics of nuclear energy production, Congress "underscored the distinction . . . between the spheres of activity left respectively to the Federal Government and the States." *Pacific Gas*, 461 U.S. at 210.

In enacting the HMTA, Congress created the same type of distinction found by this Court in *Louisiana* and *Pacific Gas*. The federal government was granted authority to regulate the intermodal transportation of hazardous materials. 49 U.S.C.App. §§ 1801, 1802. Although affirmative regulatory authority was not granted to the states, the authority of the federal government was expressly limited to preemption of inconsistent state intermodal hazardous materials requirements. 49 U.S.C.App. § 1811(a). In the case below, the lower court expanded the authority of the federal government, beyond that conferred by the HMTA, to preempt all state intermodal hazardous materials requirements related to rail transportation, whether consistent with the HMTA or not. This Court should not permit its precedential decisions, and the express requirements of the HMTA, to be ignored.

II. The decision of the lower court raises an important question of federal law that should be settled by this Court.

The lower court correctly found that the HMTA requires that the transportation of hazardous materials, by any mode, including rail, must be regulated on an intermodal basis. *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F. 2d 497, 500 (6th Cir. 1990). Further, the lower court correctly found that "the HMTA allows state regulations which are consistent with federal regulations." *Id*. at 501.

With regard to the FRSA, the lower court correctly found that the statutory authority of the United States Secretary of Transportation, and the Federal Railroad Administration, is expressly limited under the FRSA to the modal regulation of railroad safety. *Id*. at 500. Further, the lower court correctly found that in enacting the HMTA in 1974, Congress expressly removed the transportation of hazardous materials from the purview of the FRSA. *Id*.

The lower court framed the legal issue, as follows:

> The question before us is simply this: should a train carrying a load of hazardous waste be considered a railroad which happens to be carrying hazardous waste (thus suggesting application of the FRSA preemption provision) or hazardous waste

which happens to be carried by rail (thus suggesting application of the HMTA preemption provision)?

CSX, 901 F. 2d at 501. Congress answered this question by requiring intermodal regulation of the transportation of hazardous materials under the HMTA; by expressly removing the HMTA from the "laws relating to railroad safety" comprising the Secretary's authority under the FRSA; and, by expressly preserving state intermodal hazardous materials laws that are consistent with the HMTA.

The lower court erred by concluding that the general preemption provision of the FRSA may be construed as the intention of Congress to preempt state intermodal hazardous materials laws that are expressly preserved by the HMTA. *Id.* The effect of the lower court decision is to render null the express requirements of the HMTA preserving consistent state laws, and requiring that the transportation of hazardous materials be regulated only on an intermodal basis.

A. In enacting the HMTA, Congress expressly required that the transportation of hazardous materials be regulated only on an intermodal basis.

The very purpose of enactment of the HMTA was to require that the transportation of hazardous materials be regulated only on an intermodal basis. As expressly noted in the first section of the HMTA, it is "the policy of Congress in this chapter to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C.App. § 1801.

In recognition of the fact that a single shipment of hazardous materials is routinely transported by several different modes of transportation (i.e., motor carrier to railroad), Congress applied the HMTA to "any movement of property by any mode, and any loading, unloading, or storage incidental thereto." 49 U.S.C.App. § 1802(6). Thus, the HMTA governs the regulation of shippers of hazardous materials, manufacturers of containers by which such materials are shipped, and transporters by any mode. 49 U.S.C.App. § 1804(a).

Prior to enactment of the HMTA, the transportation of hazardous materials was regulated, on a separate modal basis, by several modal administrations of the Department of Transportation, exercising the statutory authority of the Secretary. In this regard, the statutory authority of the Secretary to regulate the transportation of hazardous materials, the Explosives and Other Dangerous Articles Act, was delegated to the Federal Railroad Administration. The lower court correctly noted this legislative history of the HMTA:

> In 1966, Congress created the Department of Transportation (DOT). *See* 49 U.S.C. §§ 1651-1660, as amended. The DOT received the authority under several laws previously vested in a number of government agencies and departments to regulate, among other things, the transportation of hazardous materials. P.L. 89-670, 49 U.S.C. 1651 (1966). The authority to regulate under one of these laws, the Explosives and Other Dangerous Articles Act, was transferred from the Interstate Commerce Commission. 49 U.S.C. § 1655(e)(4).
>
> This authority to regulate, among other things, the transportation of hazardous materials transferred to the Secretary was delegated by statute to modal administrations (in this case, the Federal Railroad Administration and the Federal Highway Administration). The Federal Railroad Administration (FRA) had authority to promulgate hazardous material transportation regulations for railroads through its administration of the Explosives Act. 49 U.S.C. § 1665(f)(3)(A) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(A) (1974). The Federal Highway Administration (FHA) had similar authority for motor carriers. 49 U.S.C. § 1655(f)(3)(B) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(B) (1974). In both cases, the Secretary had no power either to retain the authority or transfer it to a modal administration other than the FRA (for railroads) or FHA (for motor carriers). 49 U.S.C. § 1655(f)(3) (1966), *amended by* 49 U.S.C. § 1655(f)(3) (1974).

CSX, 901 F. 2d at 499-500.

Further, the lower court correctly found that with the enactment of the HMTA in 1974, Congress expressly removed the authority of the Secretary to regulate the transportation of hazardous materials on a modal basis. As noted by the lower court:

> The HMTA amended the DOT enabling act to prohibit the Secretary from delegating the functions, powers, and duties to administer the Explosives Act to the FRA or the FHA. Pub. L. 93-633, § 113(e)(1), (2). The amended provision read in relevant part for the FRA:
>
> > The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than [the Explosives and Other Dangerous Articles Act]).
>
> 49 U.S.C. § 1655(f)(3)(A). *Thus, the regulation of the transportation of hazardous materials moved from a modal to an intermodal basis.*

CSX, 901 F. 2d at 500 (emphasis added).

Notwithstanding its own findings that with the enactment of the HMTA Congress expressly withdrew the statutory authority of the Secretary to regulate the transportation of hazardous materials on a modal basis, and expressly required intermodal regulation under the HMTA, the lower court failed to apply its own correct analysis. In this regard, the lower court reached the anomalous conclusion that the Secretary may preempt state hazardous materials laws pursuant to the FRSA, regardless of the fact that the Secretary has no statutory authority to regulate the transportation of hazardous materials under the FRSA:

> Although we credit the PUCO's compelling argument that the creation of the HMTA in 1974 removed promulgation (though not enforcement) of regulations under the Explosives Act from the FRA, we do not believe that such removal changes the fact that FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by*

> *the Secretary*, whether or not such regulations are promulgated by the FRA through power delegated by the Secretary. *See* 45 U.S.C. § 434. Clearly, the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary directly, not by the FRA.

CSX, 901 F. 2d at 501.

The analysis by the lower court overlooked the fact that the HMTA did not merely transfer regulatory authority over hazardous materials from the FRA to the Secretary. In enacting the HMTA, Congress expressly removed the regulatory authority of the *Secretary* from the general modal safety statutes, including the FRSA, and required that the regulation of hazardous materials transportation be addressed on an intermodal basis.

The Secretary is required by statute to delegate regulatory authority over general modal safety to the modal administrations. *See, e.g.*, 49 U.S.C. § 103(c) (1982 & Supp. V 1987). The Secretary has no statutory authority under the FRSA separate from that exercised by the Federal Railroad Administration. *Id.* It is incongruous to conclude, as did the lower court below, that Congress intended to preempt state intermodal hazardous materials regulations by means of a statue under which the authority of the Secretary to regulate hazardous materials transportation was expressly removed. The only statutory authority granted to the Secretary to regulate hazardous materials transportation is contained in the HMTA, under which Congress expressly required intermodal regulation, and expressly preserved consistent state laws.

B. Congress has specifically defined the scope of preemption under the FRSA to exclude state laws expressly preserved by the HMTA.

The lower court was able to reach the inconsistent conclusion that Congress intended the FRSA to preempt state intermodal hazardous materials laws only by ignoring the express provisions of the HMTA, and by misconstruing the preemption provision of the FRSA. The court found that the following language of the FRSA exhibited the manifest intent of Congress to preempt state intermodal hazardous materials laws: "A State may adopt or

continue in force any law, rule, regulation, order, or standard *relating to railroad safety* until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434 (emphasis added).

Specifically, the lower court mistakenly concluded "that FRSA preemption relates to *all* rules and regulations regarding railroad safety," and that "the HMTA is a law relating to railroad safety." CSX, 901 F. 2d at 501. In reaching this conclusion, the lower court disregarded the fact that Congress has expressly defined the "laws relating to railroad safety" that comprise the Secretary's statutory authority under the FRSA, and has specifically excluded the HMTA.

The congressional purpose to preempt state laws "relating to railroad safety," as expressed in 45 U.S.C. § 434, is clearly defined and delimited by the general authority conveyed upon the Secretary by the FRSA to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970." 45 U.S.C. § 431(a). When the FRSA was enacted in 1970, the only existing statute governing the transportation of hazardous materials, the Explosives and Other Dangerous Articles Act, was included within the statutes supplemented by the FRSA. In 1974, statutory authority for the regulation of hazardous materials was expressly removed from the FRSA, and consolidated on an intermodal basis in the HMTA. 49 U.S.C. § 1655(f)(3)(A) (1966), *amended* by 49 U.S.C. § 1655(f)(3)(A) (1974) (repealed 1983). Congress limited the authority of the Secretary to preempt state hazardous materials requirements to the intermodal authority granted by the HMTA, by expressly excluding the Explosives Act from the list of laws relating to railroad safety that comprised the Secretary's authority under the FRSA.

In this regard, with enactment of the HMTA, Congress limited the statutory authority of the *Secretary* that could be delegated for administration under the FRSA, as follows:

> The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary *pertaining to railroad safety* as set forth in the statutes transferred to the Secretary by subsection (e) of this section (*other than [the Explosives and Other Dangerous Articles Act]*).

49 U.S.C. § 1655(f)(3)(A) (1966) *amended by* 49 U.S.C. § 1655(f)(3)(A) (1974))(repealed 1983) (emphasis added).

The lower court recognized that "[t]he HMTA amended the DOT enabling act to prohibit the Secretary from delegating the functions, powers, and duties to administer the Explosives Act to the FRA . . . ." *CSX*, 901 F. 2d at 500. Accordingly, the lower court's finding of FRSA preemption was based upon the statutory authority of the Secretary, under a statute that Congress clearly amended to exclude any authority to regulate the intermodal transportation of hazardous materials.

In 1980, Congress again amended several provisions of the FRSA. Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811 (1980), (amending 45 U.S.C. §§ 431-443). The 1980 amendments clarified the congressional intention to limit both preemption and state participation to the specific "laws related to railroad safety" supplemented by the FRSA. In this regard, the 1980 amendments expanded both the authority of the Secretary, and the authority of the states to participate in certified enforcement under the FRSA, by incorporating those laws which had only been "supplemented" in the original 1970 enactment. Once again, the regulation of hazardous materials transportation was not considered germane to either the authority of the Secretary, or to the preemption and participation of the states, under the FRSA definition of "laws relating to railroad safety."[2] This fact was expressly noted in the legislative history:

---

2 Previously, state enforcement of federal railroad safety requirements was limited to regulations promulgated under the FRSA: "A state may participate in carrying out investigative and surveillance activities in connection with any rule . . . *under this subchapter*." 45 U.S.C. § 435(a) (emphasis added). The 1980 amendments clarified state authority under the FRSA "laws relating to railroad safety," excluding any state enforcement of regulations promulgated under the HMTA:

> In addition to the provisions for State participation set forth in subsections (a) and (c) of this section, the Secretary may enter into agreements with any State to provide investigative and surveillance activities with respect to those functions transferred to the Secretary by section 1655(e)(1), (e)(2), and (e)(6)(A) of Title 49 ["railroad safety laws" listed in the Department of Transportation Act].

Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811 (1980) (enacting 45 U.S.C. § 435(g)).

> Section 4 changes existing law by expanding the permissible scope of state participation in railroad safety activity under the State safety participation program. Currently, states can only participate in investigation and enforcement activity under the 1970 Safety Act and regulations thereunder. Existing law does not allow state participation with regard to the earlier safety laws. These laws are the Safety Appliance Acts (45 U.S.C. 1-16), Locomotive Inspection Act (45 U.S.C. 22-34), Signal Inspection Act (49 U.S.C. 26), Hours of Service Act (45 U.S.C. 61-64b), and Accident Reports Act (45 U.S.C. 38-43). This section would make it clear that the states could participate in investigation and enforcement activities under these other railroad safety laws. *Since the Hazardous Materials Transportation Act is not directed specifically and solely at railroad safety, that Act is not within the scope of the amendment.*

H. R. Rep. No. 1025, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3830, 3837-38 (emphasis added).

Similarly, Congress granted the same authority to the Secretary, and clarified the duties of the Secretary with respect to "railroad safety" under the FRSA without regard to the intermodal regulation of hazardous materials transportation. As noted in the legislative history:

> Section 6 [amending 45 U.S.C. § 437] would consolidate and clarify the general powers *available to the Secretary in carrying out his duties with respect to railroad safety within the [Federal Railroad] Safety Act.*
>
> Subsection 6(a) of the bill includes within section 208(b) of the Safety Act (45 U.S.C. 437(b)) the inspection authority available to the Secretary for the purpose of carrying out his duties under the Safety Appliance Acts, the Locomotive Inspection Act, the Hours of Service Act, the Accident Reports Act, and the Signal Inspection Act. These duties had been transferred to the Secretary from the Interstate Commerce Commission by the Department of Transportation Act.

Id. at 3839 (emphasis added).

Thus, both the authority of the Secretary and participating states under the FRSA was clarified by reference to the Department of Transportation Act, which incorporated "laws relating generally to safety appliances and equipment on railroad engines and cars," and transferred the administration of such laws from the ICC to the Secretary. In this regard, both of the 1980 amendments clarifying the purpose of the FRSA referred to the functions transferred to the Secretary by sections 6(e)(1), (e)(2), and (e)(6)(A) of the Department of Transportation Act (49 U.S.C.App. §§ 1655 (e)(1), (e)(2), and (e)(6)(A)). *See* 45 U.S.C. §§ 435(g), 437(b). The Department of Transportation Act, in pertinent part, provided that:

> (e) There are hereby transferred to and vested in the Secretary all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under —
>
> (1) the following laws *relating generally to safety appliances and equipment on railroad engines and cars*, and protection of employees and travelers:
>
> (A) The Act of March 2, 1893, as amended (27 Stat. 531; 45 U.S.C. 1 et seq.) [Safety Appliance Act].
>
> (B) The Act of March 2, 1903, as amended (32 Stat. 943; 45 U.S.C. 8 et seq.) [Safety Appliance Act].
>
> (C) The Act of April 14, 1910, as amended (36 Stat. 298; 45 U.S.C. 11 et seq.) [Safety Appliance Act].
>
> (D) The Act of May 30, 1908, as amended (35 Stat. 476; 45 U.S.C. 17 et seq.) [Safety Appliance Act].
>
> (E) The Act of February 17, 1911, as amended (36 Stat. 913; 45 U.S.C. 22 et seq.) [Locomotive Inspection Act].
>
> (F) The Act of March 4, 1915, as amended (38 Stat. 1192; 45 U.S.C. 30) [Locomotive Inspection Act].

(G) Reorganization Plan No. 3 of 1965 (79 Stat. 1320).

(H) Joint Resolution of June 30, 1906, as amended (34 Stat. 838; 45 U.S.C. 35) [Accident Reports Act].

(I) The Act of May 27, 1908, as amended (35 Stat. 325; 45 U.S.C. 36 et seq.) [Accident Reports Act].

(J) The Act of March 4, 1909, as amended (35 Stat. 965; 45 U.S.C. 37) [Accident Reports Act].

(K) The Act of May 6, 1910, as amended (36 Stat. 350; 45 U.S.C. 38 et seq.) [Accident Reports Act].

(2) the following law relating generally to hours of service of employees: The Act of March 4, 1907, as amended (34 Stat. 1415; 45 U.S.C. 61 et seq.) [Hours of Service Act].

. . .

(4) *the following provisions of law relating generally to explosives and other dangerous articles: Sections 831-835 of Title 18 [the Explosives and Other Dangerous Articles Act].*

. . .

(6) the following provisions of the Interstate Commerce Act, as amended ---

(A) relating generally to safety appliances methods and systems: Section 25 (49 App.U.S.C. 26) [Safety Appliance Act].

49 U.S.C.App. § 1655(e) (repealed in part 1983) (emphasis added).

Three aspects of the 1980 amendments of the Department of Transportation Act are especially noteworthy. First, Congress expressly indicated that the purpose of the amendments was to "clarify the general powers available to the Secretary in carrying out his duties with respect to railroad safety within the [Federal

Railroad] Safety Act."[3] Secondly, Congress expressly noted that the HMTA was not within the scope of the clarifying amendments. And finally, Congress clarified the intent of the FRSA by reference to "laws relating generally to safety appliances and equipment on railroad engines and cars, and protection of employees and travelers," and specifically excluded any reference to either the Explosives and Other Dangerous Articles Act, a hazardous materials transportation statute within the same subsection as the referenced "laws relating generally to safety appliances and equipment," or to the HMTA. *Compare* 49 U.S.C.App. § 1655(e)(1), (e)(2), (e)(6)(A) *with* 49 U.S.C.App. § 1655(e)(4) (repealed 1983). Thus, the "list of other railroad safety statutes" to be supplemented by the FRSA was expressly incorporated into the FRSA, and the statutory basis for intermodal hazardous materials regulation was expressly excluded from the "laws relating to railroad safety" that comprise the Secretary's statutory authority under the FRSA.

Finally, in amending the FRSA in 1980, Congress conclusively demonstrated that the HMTA was not to be considered as a "law relating to railroad safety" under the FRSA, *unless Congress expressly required otherwise.* In this regard, Congress included the HMTA within only one section of the FRSA:

> *As used in this section,* the term 'Federal railroad safety laws' means this Act, the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*), and those laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act (49 U.S.C. 1655(e)(1), (2), and (6)(A)).

---

3 H.R. Rep. No. 1025, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3830, 3839. It is important to note that in defining its own authority, the FRA expressly recognizes its limited authority to enforce regulations under the HMTA, *separate from* its general regulatory authority for railroad safety under the FRSA statutorily delegated from the Secretary:

> By delegation from the Secretary of Transportation, the Administrator has responsibility for: (a) *Enforcement* of Subchapters B and C of Chapter I, Subtitle B, Title 49, CFR, with respect to the transportation or shipment of hazardous materials by railroad (49 CFR 1.49(s)); (b) *Exercise of the authority* vested in the Secretary by the Federal Railroad Safety Act of 1970, 45 U.S.C. 421, *et seq.* (49 CFR 1.49(m)).

49 C.F.R. § 209.1 (emphasis added).

Federal Railroad Safety Authorization Act of 1980, § 10(e), Pub. L. No. 96-423, 94 Stat. 1811 (1980) (codified at 45 U.S.C. § 441(e)) (emphasis added).

Clearly, had Congress considered the FRSA to be generally applicable to the intermodal regulation of hazardous materials transportation, there would have been no need to expressly include the HMTA in one specific section of the FRSA, or to limit the definition to that particular section. Neither the FRSA generally, nor the preemption provision of the FRSA, was intended by Congress to apply to consistent state enforcement of federal intermodal hazardous materials requirements.

It is difficult to imagine a more conclusive expression of the legislative intention to separate the general safety authority over railroads under the FRSA, from the specific intermodal authority over the regulation of hazardous materials transportation contained within the HMTA. Unquestionably, the authority of the Secretary under the FRSA, state participation authority under the FRSA, and federal preemption of state laws under the FRSA, were intended by Congress to exclude any consideration of the transportation of hazardous materials. Congress expressly recognized and reserved the intermodal regulation of hazardous materials to the HMTA.

As it stands today, the Secretary is empowered under the FRSA to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for *all areas of railroad safety* supplementing provisions of law and regulations in effect on October 16, 1970." 45 U.S.C. § 431(a) (emphasis added). "All areas of railroad safety" is expressly defined without reference to the regulation of hazardous materials transportation. 45 U.S.C. § 431(k). The HMTA, enacted in 1974, is clearly not a law that was "in effect on October 16, 1970."

As noted by Congress, "the general powers available to the Secretary in carrying out his duties with respect to *railroad safety* within the [Federal Railroad] Safety Act," is clarified by 45 U.S.C. § 437. H.R. Rep. No. 1025, 96th Cong., 2d Sess. 14, *reprinted in* U.S. Code Cong. & Admin. News 3830, 3839. In this regard, the Secretary has broad authority "to issue orders directing compliance with this chapter or with any *railroad safety* rule, regulation, order, or standard *issued under this chapter*." 45 U.S.C. § 437(a) (emphasis added). The FRSA conveys broad inspection authority "[t]o carry out the Secretary's responsibilities *under this subchapter and under the functions transferred by section 1655(e)(1), (e)(2), and (e)(6)(A) of*

Title 49." 45 U.S.C. § 437(b) (emphasis added). Neither the Secretary, nor the FRA by statutory delegation, has any authority to regulate the intermodal transportation of hazardous materials as an area of "railroad safety" under the FRSA.

The authority of the states to participate in "investigative and surveillance activities" under the FRSA is also defined "with respect to those functions transferred to the Secretary by section 1655(e)(1), (e)(2), and (e)(6)(A)." 45 U.S.C. § 435(g). *See also* 45 U.S.C. § 436(a)(1), (b)(1). Similarly, the jurisdiction of the United States district courts to enforce the orders of the Secretary is defined by reference to orders "under this subchapter," and under the laws transferred by section 1655(e)(1), (e)(2), and (e)(6)(A) of Title 49. 45 U.S.C. § 437(a), (d)(1), (d)(2); 45 U.S.C. § 439(a).

Thus, in requiring preemption of state "laws, rules, regulations, orders, and standards *relating to railroad safety*," Congress clearly defined "railroad safety" as the specific subjects addressed by the provisions of the FRSA and Sections 1655(e)(1), (e)(2), and (e)(6)(A) of Title 49. 45 U.S.C. § 434. Congress expressly excluded intermodal hazardous materials regulations from the definition of "laws. . . relating to railroad safety." 49 U.S.C. § 103(c)(1) (1982 & Supp. V 1987). As recently as 1983, Congress recodified 49 U.S.C. § 1655(f)(3)(A), and again expressly defined "railroad safety" as excluding hazardous materials regulation under the HMTA:

> (c) The [Federal Railroad] Administrator shall carry out—
>
> (1) duties and powers related to railroad safety vested in the Secretary by section 6(e)(1), (2), and (6)(A) of the Department of Transportation Act (49 App.U.S.C. 1655(e)(1), (2), and (6)(A)).

49 U.S.C. § 103(c)(1) (1982 & Supp. V 1987). Neither the Explosives Act, nor the HMTA, were included by Congress in the statutes comprising the authority over "railroad safety vested in the Secretary" under the FRSA. The preemption of state hazardous materials requirements has clearly been left to the express provisions of the HMTA.

The clear and manifest intent of Congress requires that questions of federal preemption of state intermodal hazardous materials laws be resolved by reference to the only federal statute that governs the intermodal transportation of hazardous materials,

the HMTA. In enacting the HMTA, Congress expressly removed from the FRSA any statutory authority to either regulate the transportation of hazardous materials, or to preempt state hazardous materials laws. Congress expressly required that hazardous materials transportation be regulated under the HMTA on an intermodal basis, and expressly preserved the authority of the states to regulate the intermodal transportation of hazardous materials in a manner consistent with the HMTA.

C. The decision of the lower court created a statutory conflict between the HMTA and the FRSA, and resolved that conflict by nullifying the requirements of the HMTA.

Despite finding that in enacting the HMTA, Congress removed the statutory authority of the Secretary from the respective modal safety statutes, including the FRSA, the lower court applied the preemption provision of the FRSA to state intermodal hazardous materials requirements. The effect of this misconstruction is to defeat both the congressional purpose of the HMTA to require intermodal regulation, and the express congressional intent to provide for consistent state regulation.

The rule of statutory construction that should govern this case is that such a preemption analysis "is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch v. Ware*, 414 U.S. 117, 127 (1973) (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) (citations omitted)). Thus, in *Louisiana*, this Court held that where a finding of preemption necessitated a finding that two federal statutes were in conflict, the statutory provisions should be reconciled, if possible, to preserve the authority of the state, and to avoid the conflict. *Louisiana*, 476 U.S. at 370. The lower court agreed with this rule of statutory construction, but then ignored it. *CSX*, 901 F. 2d at 502.

Specifically, the lower court found that:

> A failure to follow the preemption provision of the HMTA in no respect ousts the HMTA. In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated

> under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous material transportation on an intermodal basis are both respected.

CSX, 901 F. 2d at 503.

The conclusion of the lower court is wrong. In expressly requiring that the transportation of hazardous materials, *by any mode*, be regulated under the HMTA, Congress did not create an exception for hazardous materials transported by rail. By expressly preserving consistent state intermodal hazardous materials regulations, Congress did not intend to preempt those same state requirements by means of an earlier statute that addresses a different subject.

By first concluding that the HMTA is a "law relating to railroad safety" under the FRSA, the lower court necessarily concluded that the two federal statutes were in conflict. *CSX*, 901 F. 2d at 501. As the lower court noted, "unlike the preemption provision of the FRSA, which forbids state regulation on subject matter on which the Secretary has already adopted a regulation, the HMTA allows state regulations which are consistent with federal regulations." *Id.* The lower court "resolved" this conflict by nullifying the express requirements of the HMTA.

If the HMTA is not properly considered to be one of the "railroad safety laws" comprising the Secretary's authority under the FRSA, there is no conflict between the respective preemption provisions. The FRSA preempts state laws "relating to railroad safety" where the Secretary has promulgated a regulation under the FRSA "covering the subject matter." The HMTA preempts inconsistent state intermodal hazardous materials requirements, and preserves the states' authority to enforce consistent intermodal regulations.

While the lower court was correct that its decision does not completely oust the HMTA, it certainly does so with respect to any state enforcement of federal intermodal regulations that apply to the transportation of hazardous materials by rail. The effect of this decision is to render the statutory scheme of the HMTA anomalous, and unworkable, subjecting state citizens to the harm that congress intended to preclude through enactment of the HMTA.

Under the provisions of the HMTA left undisturbed by the lower court, states retain the right to regulate, consistent with the requirements of the HMTA, shippers of hazardous materials, manufacturers of containers by which such materials are shipped, and transporters by any mode, except railroad. 49 U.S.C.App. § 1804(a). Thus, the decision of the lower court results in the anomalous situation of consistent state regulations applying to the container in which a particular shipment of hazardous materials is packaged, to the shipper, to the motor carrier who would transport the shipment to the railyard, and to the motor carrier who would transport the shipment from the railyard—but not to the transporting railroad. It defies reason to believe that Congress would have required this result without creating an express exception for railroads.

Thus, "the need for regulation of hazardous materials transportation on an intermodal basis," expressly recognized by Congress, was clearly not "respected" by the lower court. In contravention of the intent of Congress, the lower court prohibited the states from enforcing intermodal hazardous materials requirements that are consistent with the HMTA. The decision of the lower court should be reversed.

CONCLUSION

The decision of the lower court defeats the manifest intention of Congress, prohibiting the sovereign states from protecting their citizens from the very real threat posed by the daily transportation of toxic and explosive substances through their communities. Congress clearly did not envision such a result, and this Court should not permit it to stand.

For the foregoing reasons, Petitioners respectfully submit that this petition for certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

JAMES B. GAINER
Assistant Attorney General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43266-0573
(614) 466-4397

Attorneys for Petitioners,
The Public Utilities Commission of Ohio, *et al.*

In The
Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

Appendix

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

JAMES B. GAINER
Assistant Attorney General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43266-0573
(614) 466-4397

Attorneys for Petitioners,
The Public Utilities Commission
of Ohio, *et al.*

TABLE OF CONTENTS

CSX TRANSPORTATION, INC., et al., Plaintiffs,

v.

The PUBLIC UTILITIES COMMISSION OF OHIO, et al., Defendants.

No. C2-88-1023.

United States District Court, S.D. Ohio, E.D.

Dec. 12, 1988.

OPINION AND ORDER

GRAHAM, District Judge.

In 1970 Congress enacted the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 *et seq.* which authorized the Secretary of the Department of Transportation to adopt railroad safety regulations. Congress included in that act broad preemption provisions excluding the states from legislating in any area of railroad safety already covered by regulations adopted by the Secretary. In 1974 Congress enacted the Hazardous Materials Transportation Act (HMTA), 49 U.S.C.App. § 1801 *et seq.* authorizing the Secretary to adopt rules and regulations governing the transportation of hazardous materials by any mode of transportation. The preemption provisions of the HMTA permit the states to adopt and enforce their own laws and rules regulating the transportation of hazardous materials so long as they are not inconsistent with federal rules adopted under the HMTA. This case presents the question of whether state legislation regulating the transportation of hazardous materials by rail is governed by the strict preemption provisions of the FRSA or by the more liberal preemption provisions of the HMTA.

The State of Ohio has recently passed legislation incorporating into Ohio law the federal regulations adopted by the Secretary of Transportation under the HMTA relating to the transportation of hazardous materials by rail. *See* Ohio Rev.Code § 4907.64 (effective September 26, 1988) (authorizing the Public

Utilities Commission of Ohio (PUCO) to adopt railroad safety laws "consistent with, and equivalent in scope, coverage, and content to, the provisions of the [HMTA], and regulations adopted under it."); Ohio Admin.Code § 4901:3-1-10 (effective December 10, 1988) (adopting the provisions of the HMTA regulations contained in 49 C.F.R. §§ 171-179 governing the transportation of hazardous materials by rail). Ohio seeks to enforce these rules against railroads through its own system of enforcement, which includes civil penalties. *See* Ohio Rev.Code § 4905.83; Ohio Admin.Code §§ 4902:2-7-01 through 4901:2-7-22.

This legislation resulted from a study of state and federal hazardous materials regulation, enforcement and emergency response conducted by a group of state agencies collectively known as the Ohio Hazardous Substances Emergency Team (OHSET) which was formed in response to the July, 1986 disaster in Miamisburg, Ohio when a number of railroad cars operated by plaintiff CSX Transportation, Inc., derailed near Miamisburg, Ohio. A rail car containing phosphorous ignited and burned, spreading a cloud of toxic gas throughout the area and forcing the evacuation of 40,000 citizens. The Ohio act reflects the judgment of the executive and legislative branches of state government that federal enforcement of regulations governing hazardous materials transported by rail is inadequate.

Plaintiffs are four major railroads engaged in interstate rail transportation in and through Ohio who challenge the constitutionality of the newly enacted Ohio statutes and administrative regulations. Defendants are the PUCO, its chairman and commissioners. Plaintiffs challenge the Ohio statutes and regulations on the grounds that they violate the Supremacy Clause of the United States Constitution, the preemption provisions of the FRSA and the HMTA and on the further grounds that they impose an undue burden on interstate commerce. The matter is now before the Court on the plaintiffs' motion for summary judgment and the defendants' cross motion for summary judgment. In their motions, the parties seek summary judgment on the issue of federal preemption.

The United States Supreme Court has recently summarized the various tests enunciated for determining whether federal law has preempted state legislation:

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, [97 S.Ct. 1305, 51 L.Ed.2d 604] (1977), when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland*, 369 U.S. 663, [82 S.Ct. 1089, 8 L.Ed.2d 180] (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 [83 S.Ct. 1210, 10 L.Ed.2d 248] (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 [, 103 S.Ct. 2890, 77 L.Ed.2d 490] (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 [67 S.Ct. 1146, 91 L.Ed. 1447] (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 [, 61 S.Ct. 399, 85 L.Ed. 581] (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 [, 102 S.Ct. 3014, 73 L.Ed.2d 664] (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 [,104 S.Ct. 2694, 81 L.Ed.2d 580] (1984).

Louisiana Public Service Commission v. FCC, 476 U.S. 355 358-369, 106 S.Ct. 1890, 1989-99, 90 L.Ed.2d 369 (1986).

At the heart of each of these standards is the discernment of the true purpose of Congress. "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission*, 476 U.S. at 369, 106 S.Ct. at 1899.

The stated purpose of the FRSA is "to promote safety in all areas of railroad operations." 45 U.S.C. § 421. The Act requires the Secretary of Transportation to prescribe appropriate rules,

regulations, orders and standards for all areas of railroad safety and to conduct research, development, testing, evaluation and training in all areas of railroad safety. In 45 U.S.C. § 434 Congress declared its intention that laws, rules, regulations, orders and standards relating to railroad safety should be nationally uniform to the extent practicable. The statute reads as follow:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Thus, under 45 U.S.C. § 434, a state may legislate in areas relating to railroad safety only until such time as the Secretary has adopted a rule, regulation, order or standard covering the same subject matter. A state, within limitation, may adopt an additional or more stringent rule only when necessary to address a local safety hazard. This exception does not apply to this case.

The FRSA, however, does contemplate a limited state role in enforcement. Title 45, U.S.C. § 435 provides that a state may participate in investigation and surveillance in connection with any rule or standard prescribed by the Secretary under the FRSA pursuant to certification provisions contained in the statute. The section provides, however, that "the Secretary shall retain the exclusive authority to assess and compromise penalties ... for the violation of rules, regulations, orders, and standards prescribed by the Secretary" under the FRSA.

The stated purpose of the HMTA is "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the trarsportation of hazardous materials in

commerce." 49 U.S.C.App. § 1801. The Act authorizes the Secretary to issue regulations for the safe transportation of hazardous materials which "shall be applicable to any person who transports . . . a hazardous material." 49 U.S.C.App. § 1804(a). The Act authorizes the Secretary to issue regulations governing not only the transportation of hazardous materials, but also their handling and the manufacture, repair and testing of the containers in which they are transported. 49 U.S.C.App. §§ 1804, 1805.

In 49 U.S.C.App. § 1811, Congress provided for preemption of state laws on the subjects covered by the HMTA only when they are inconsistent with the Act or regulations adopted pursuant to it.

> (a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

Section 49 U.S.C.App. § 1811(b) provides a procedure whereby a state may request the Secretary of Transportation to make an administrative determination whether or not a state requirement is inconsistent with the HMTA or a regulation adopted pursuant to it. The Secretary has delegated this authority to the Office of Hazardous Materials Transportation, Research and Special Programs Administration (RSPA), 49 C.F.R. § 107.201 *et seq.*

Acting pursuant to the HMTA, the Secretary has adopted a body of regulations defining hazardous materials, establishing requirements for the containers they are transported in, and regulating their transportation by any mode, including air, water, rail and highway. These regulations are known as the Hazardous Materials Rules (HMR) and they are found at 49 C.F.R. §§ 171-179. The HMR's which relate specifically to railroads are found at 49 C.F.R. § 174.

Plaintiffs contend that this case is controlled by the broad preemption provisions of FRSA and that Congress intended to preclude state regulation of the transportation of hazardous materials by rail. Plaintiffs argue that regulations relating to the transportation of hazardous materials by rail are regulations "relating to railroad safety" within the meaning of 45 U.S.C. § 434 and that the states are precluded thereby from adopting or enforcing dual standards which relate to the transportation of hazardous materials by rail. Defendants contend, on the other

hand, that Congress intended that the FRSA and its preemption provisions should apply only to general railroad safety regulations pertaining essentially to equipment, track and operating procedures whereas Congress addressed the subject of hazardous materials in the HMTA and intended that its preemption provisions should apply to such regulations.

It is clear that when Congress enacted the FRSA in 1970 it addressed not only general rail safety but also specifically addressed the transportation of hazardous materials.

> The Congress declares that the purpose of this Chapter [FRSA] is to promote safety in all areas of railroad operations . . . *and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.*

45 U.S.C. § 421 (emphasis added). There is no dichotomy, as defendants suggest, between the FRSA and the HMTA, with the former limited to general railroad safety and the latter directed specifically toward the intermodal regulation of the transportation of hazardous materials. Indeed the regulation of the transportation of hazardous materials by rail is inextricably intertwined with the regulation of railroad equipment and operating procedures.

The legislative history of the FRSA evidences a clear Congressional intent that rail safety regulations be nationally uniform and that all enforcement should be by federal authorities.

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulations and enforcement. It is a national system. . . . In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross many State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.Code

Cong. & Admin.News 4104, 4110-4111.

> The Committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems. Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the nation's rail system to make all enforcement Federal in nature. The Secretary will have exclusive authority to assess and compromise penalties and to recommend court action for recovery of such penalties . . . [States] will have no authority to assess and compromise penalties or to seek State judicial action.

Id. at 4109.

The scope of preemption under the FRSA has been broadly construed by the courts. *See National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11 (3d Cir.1976); *Chesapeake & Ohio Railway Co. v. City of Bridgman*, 669 F.Supp. 823, 825 (W.D.Mich.1987); *Consolidated Rail Corp. v. Pennsylvania Public Utility Commission*, 536 F.Supp. 653 (E.D.Pa.), *aff'd mem.*, 696 F.2d 981 (3rd Cir. 1982), *aff'd mem.* 461 U.S. 912, 103 S.Ct. 1888, 77 L.Ed.2d 280 (1983); *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 671 F.Supp. 466 (W.D.Tex.1987), *aff'd*, 850 F.2d 264 (5th Cir.1988).

As noted above, the preemption clause of the FRSA provides in part as follows:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement.

45 U.S.C. § 434. A central issue in this case is the meaning of the phrase "any law, rule, regulation, order or standard relating to railroad safety." The key components of the phrase are: "any law, etc.," "relating to," "railroad safety." These are words of broad meaning and in ordinary usage they would certainly include rules relating to the transportation of hazardous materials by rail. Defendants have a heavy burden to show that the phrase should be interpreted so as to exclude such rules.

The legislative history of FRSA indicates that Congress intended the phrase, "relating to railroad safety," as used in 45 U.S.C. § 434, to include intermodal safety regulations insofar as they apply to rail transport. For instance, Congress included in a list of "existing railroad safety laws" the Explosives and Other Dangerous Articles Act, a predecessor of the HMTA which provided for intermodal regulation of the transportation of hazardous materials. H.R.Rep. No. 1194, 91st Cong., 2d Sess. (Appendix B).

In 1980 when Congress defined the term "railroad safety laws" in the context of a "whistle blower" statute, the definition expressly included the HMTA. *See* 45 U.S.C. § 441(e). The statutes listed in this section are the same statutes set forth in the list mentioned in the preceding paragraph, except for the substitution of the HMTA for the Explosives Act.

The legislative history of the FRSA shows that the issue of federal preemption was vigorously debated, leaving a clear record of Congressional intent for virtually complete federal preemption in the area of railroad safety laws. The legislative history of HMTA, which was enacted just four years later, is devoid of any debate or discussion on the standard of preemption applicable to rules which regulate the transportation of hazardous materials by rail.

Representative Springer observed during the hearings on FRSA:

> *I think this [preemption] is the great area or problem,* Mr. Secretary where there would be a possibility, this is just opinion, but I think I can read that this would be the area probably where we might have the most agreement or disagreement about what ought to be done. *I think this is really what the turning point of the bill will be, in my opinion.*

Hearings Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 43 (1970) (emphasis added).

Representative Kuykendall made the following comment:

> Yes. Mr. Reed, I think you have gathered-I know you were here this morning and heard the testimony and probably at least had representatives at some of the other sessions. There is not much disagreement with this bill and *it seems to me that almost the entire area of*

> *disagreement has now been pretty well isolated.* Disagreeing with your position on the overall goals of this bill would be just like disagreeing with God and motherhood. You just don't do it. *So let's get to the area of discussion of what we are faced with, the problem of preemption and authority of the different levels of regulatory agencies.*

See id. at 141 (emphasis added).

It would certainly seem that if Congress had intended rail safety regulations adopted under the HMTA to be subject to a different standard than the one so recently and vigorously debated during the adoption of the FRSA, then the legislative history would reflect such a decision. The absence of debate or comment on the issue of preemption of railroad regulations in the legislative history of the HMTA leads to the conclusion that in enacting the HMTA Congress must have intended that any rail safety regulations adopted pursuant to it would fall under the same preemption standard already established for all rail safety regulations under the FRSA.

Defendants are unable to point to any specific provision of the HMTA which negates the express preemption provisions of the FRSA. Defendants' argument is based upon an implied repeal of the preemption provisions of the FRSA by the more liberal preemption provisions of the HMTA. The implied repeal of an earlier statute by the mere enactment of a later, even potentially conflicting one, is disfavored and should be avoided whenever possible. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 104 S.Ct. 2862, 2878, 81 L.Ed.2d 815 (1984); *TVA v. Hill*, 437 U.S. 153, 189-190, 98 S.Ct. 2279, 2299-2300, 57 L.Ed.2d 117 (1987); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-169, 96 S.Ct. 1319, 1322-23, 47 L.Ed.2d 653 (1976); *Davis v. Devine*, 736 F.2d 1108, 1114 (6th Cir.), *cert. denied.*, 469 U.S. 1020, 105 S.Ct. 436, 83 L.Ed.2d 362 (1984). Here, the most logical way to resolve any conflict is to give effect to the specific preemption language of the FRSA (which by its literal language applies to all rail safety regulations adopted by the Secretary) while applying the more liberal preemption standard of the HMTA to regulations adopted with respect to other modes of transportation.

Defendants point out that the HMTA transferred regulatory authority over hazardous materials transportation from the Federal

Railroad Administration (FRA) to the Secretary of the Department of Transportation and argue that this signifies a Congressional intent that such regulations should not be governed by the preemption provisions of the FRSA. Defendants overlook the fact that the preemption provisions of the FRSA apply to rail safety measures adopted by the Secretary, not the FRA. By transferring hazardous materials regulation from the FRA to the Secretary, Congress did not in any way separate railroad safety regulation from hazardous materials regulation, rather, the Secretary is responsible for both. Indeed, as noted, the FRSA preemption provision is tied to railroad safety regulations adopted by the Secretary, not by the FRA. Defendants' argument would make sense only if FRSA preemption was in fact tied to regulations adopted by the FRA and plainly it is not.

Every court which has specifically addressed the question has held that the preemption standards of the FRSA apply to regulations adopted by the Secretary under the HMTA. *See Atchison, Topeka & Santa Fe Railway Company v. Illinois Commerce Commission*, 453 F.Supp. 920 (N.D.Ill.1977); *Missouri Pacific Railroad Co. v. Railroad Commission of Texas*, 671 F.Supp. 466 (W.D.Tex.1987), *aff'd*, 850 F.2d 264 (5th Cir.1988) (affirmed solely on FRSA preemption; Fifth Circuit found it unnecessary to rule on HMTA preemption issue); *CSX Transportation, Inc., v. City of Tullahoma*, Case No. CIV4-87-47, Slip Op. at 11, -- F.Supp. -- (E.D.Tenn.Feb. 17, 1988). In *Atchison*, at 924, the court said:

> However, these statutes do not require the overly technical interpretation which would subject orders and regulations issued by the Secretary under one law to a different preemption standard than those under another. [FRSA and HMTA] The Railroad Safety Act of 1970 provides that state action is preempted when the Secretary has issued orders or regulations covering the field. This is not limited merely to those promulgated under that Act, but refers instead to any action taken by the Secretary . . . .
>
> Any more narrow interpretation of the Railroad Safety Act would frustrate its stated purpose of establishing uniform national standards.

Similarly in *Missouri Pacific*, the court said:

> Section 434 refers to acts by "the Secretary," referring to

> the Secretary of Transportation, and does not confine itself to acts pursuant to the FRSA. Thus, an act by the Secretary pursuant to, for example, the HMTA could preempt state law under the terms of section 434.

671 F.Supp. at 471 n. 1.

> And finally, in *CSX Transportation*, at 11, the court held:
> 1. Transportation of hazardous material is regulated by the Secretary of Transportation under both the HMTA and the FRSA. Although the preemption standard is somewhat different under the two acts, under the FRSA, state action is preempted when the Secretary has issued orders or regulations covering the field. Preemption is not limited to those regulations promulgated under the FRSA, but refer instead to any other rule, regulation, order, or standard covering the subject matter and adopted by the Secretary.

The legislative history of Congressional actions taken since the enactment of the HMTA reinforce the conclusion that Congress intended the preemption provisions of FRSA to apply to regulations adopted under the HMTA insofar as they apply to rail transport. During a joint hearing before the House of Representatives in 1979, the House Committee submitted written questions to the Department of Transportation about state involvement in the regulation of transportation of hazardous materials. The answers were given by the director of RSPA and included a discussion of the differing preemption standards of the FRSA and the HMTA:

> The preemption provisions of the Hazardous Materials Transportation Act operate to preempt any State or local requirement that is "inconsistent" with the Federal regulations. Unless it is "inconsistent," a State or local requirement is *not* preempted. *In the case of a State or local restriction directed at rail transport, there is a second Federal statutory provision that acts to further limit the legal authority of States and localities. Under the Railroad Safety Act*, a State or locality is expressly preempted from any "additional or more stringent" rail safety requirement unless it is "necessary to eliminate or reduce a local safety hazard."

Hazardous Materials Transportation Act Amendments: Joint Hearing

Before the Subcommittee on Surface Transportation and Subcommittee on Aviation of the Committee on Public Works and Transportation on H.R. 3502, 96th Cong., 1st Sess. 33 (1979) (emphasis added in part).

This statement was made in the context of hearings with respect to appropriations for enforcement of the HMTA and in response to specific questions by the Congressional Subcommittee relating to the role of the states in the regulation of the transportation of hazardous materials. Viewed in this context, it is a clear statement to Congress that the Department of Transportation interprets the preemption provisions of the FRSA to apply to hazardous materials regulations adopted under the HMTA. Although amendments have been made to both the FRSA and the HMTA since that time, none of them have changed the preemption provisions of either statute.

Likewise, Congress has taken no action to overturn the decision of the District Court for the Northern District of Illinois in *Atchison, Topeka & Santa Fe Railway Company v. Illinois Commerce Commission*, 453 F.Supp. 920 (N.D.Ill.1977) The United States was an intervening plaintiff in *Atchison* and there was no appeal from the district court's decision. As noted above, the *Atchison* court held that the preemption provisions of FRSA apply to regulations adopted under the HMTA. "Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir.), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983), *citing Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S.Ct. 866, 869-70, 55 L.Ed.2d 40 (1978), and *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370 n. 8, 45 L.Ed.2d 280 (1975).

Congress's failure to amend the FRSA or the HMTA preemption provisions in response to either the *Atchison* decision or RSPA's position in its response to the House Committee in May of 1979 can be read as acceptance of those interpretations. Indeed Congress's Office of Technology Assessment has accepted this interpretation in a report entitled *Transportation of Hazardous Materials*, OTA-SET-304 (Washington, D.C.; U.S. Government Printing Office, July 1986). In the context of a discussion of a federally financed program for training state inspectors, this comment appears at page 213 of the report:

> Even where State inspectors have been trained in rail safety procedures, they cannot conduct hazardous materials inspections, because authority to do so has not been granted to States.

The author of the report attributed this interpretation to the FRA. *See* Defendants' Motion for Leave to File Supplement to Prior Affidavit or to File Supplemental Pleading, Docket 26.

Defendants further argue that Congress's treatment of the role of the states in surveillance and inspection under the FRSA demonstrates its intent that regulation of the transportation of hazardous materials by rail should be governed by the preemption standards of the HMTA.

When the HMTA was enacted in 1974, Congress also amended the FRSA. The legislative history indicates Congressional displeasure with the performance of the FRA.

> The Committee found that after three and one half years, the FRA inspection of rail equipment and plant seems to be a stepchild of the Department's low key safety approach. by April 1974, the FRA had only 12 track inspectors for over 300,000 miles of rail track, 16 signal and train control inspectors, and only 50 inspectors for more than 1.7 million freight cars and 25,000 locomotives. There were only 8 inspectors for hazardous materials. When questioned about bridges and tunnels, the FRA witness revealed his department had only one bridge and tunnel expert in Washington, and yet he stated that there were 192,000 bridges. Many of these bridges are old, and one, which crosses the Mississippi River, was first opened in 1856 and is still in operation today.

H.R.Rep. No. 1083, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S.Code Cong. & Admin.News 7669, 7672.

Congress also criticized the FRA's delay in implementing provisions designed to involve the state in the enforcement of safety regulations within the scope of FRSA, as authorized by 45 U.S.C. § 435. *Id.* at 7673. Congress responded to these concerns by increasing the appropriations to administer the FRSA and requiring that a greater percentage of such appropriations be directed to enforcement activities. Transportation Safety Act of 1974, 1974

U.S.Code Cong. & Admin.News 7669 *et seq.* (codified as amended at 45 U.S.C. § 444).

In 1980 Congress again amended the state participation program under FRSA. Federal Railroad Safety Authorization Act of 1980, Pub.L. No. 96-423, 1980 U.S.Code Cong. & Admin.News (94 Stat.) 1811 (amending 45 U.S.C. §§ 431-443). This amendment expanded the scope of state participation under the inspection and surveillance provisions of FRSA, 45 U.S.C. § 435, but specifically excluded the HMTA from this program. Defendants argue that this indicates Congress's intention that the regulation of the transportation of hazardous materials by rail should be subject to the preemption provisions of the HMTA, otherwise the exclusion of the HMTA from the state certified inspection and surveillance provisions of FRSA would exclude the states from any role whatsoever in the enforcement of regulations regarding the transportation of hazardous materials by rail. Defendants argue that it would not be logical for Congress to have excluded the states from any role in this important area when it included them in the enforcement of other areas of railroad safety.

The Court agrees that it may have been logical or even desirable for Congress to have provided a meaningful state role in regulating the transportation of hazardous materials by rail. However, the issue before the Court is not the wisdom of the Congressional enactments, but what Congress intended. Based upon a considered analysis of the statutory language and the legislative history, the Court is satisfied that Congress intended that the strict preemption provisions of the FRSA apply to hazardous materials regulations applicable to railroads adopted under the HMTA. This means that the only role of the states in the regulation of the transportation of hazardous materials by rail is that narrow role permitted by the preemption provisions of the FRSA.

Defendants cite a decision of the District Court of Nevada in the case of *Southern Pacific Transportation Co. v. Public Service Commission of Nevada*, No. CV-N-86-444-BRT Slip Op. (D.Nev. Sept. 28, 1988) (attached as Appendix G to Defendants' Cross Motion For Partial Summary Judgment, Docket 16) and Inconsistency Ruling IR-19, 52 Fed.Reg. 24404, 24410, 24411 (1987), *aff'd* 53 Fed.Reg. 11600 (1988) (attached as Appendix F, Defendants' Cross Motion For Partial Summary Judgment, Docket 16).

In its brief opinion in *Southern Pacific Transportation*, the

District Court for the District of Nevada upheld regulations of the Public Service Commission of Nevada which governed the temporary storage of hazardous materials on railroad property. The Court found that the federal regulations did not address the manner of storage of hazardous materials and that there was no inconsistency between the Nevada regulations and the federal regulations. The court considered only the preemption provisions of the HMTA. No mention was made of the preemption provisions of the FRSA, thus it appears that the central issue in the present case was neither presented to, nor decided by the Nevada District Court.

Nor did the RSPA inconsistency ruling cited by defendants address the issue presented by the present case. By law RSPA is limited to a consideration of inconsistency under the preemption standards of HMTA. RSPA inconsistency rulings contain an explicit acknowledgment of this limitation upon its decision making:

> Since these precedings are conducted pursuant to the HMTA, *only* the question of statutory preemption *under the HMTA will be considered. A Federal court might find a non-Federal requirement statutorily preempted under another statute.*

See, e.g., Inconsistency Ruling IR-19, 52 Fed.Reg. 24404, 24405 (1987), *aff'd*, 53 Fed.Reg. 11600 (1988) (emphasis added). *See also* 49 C.F.R. § 107.209. The statement in this RSPA ruling that "RSPA encourages states to adopt and enforce the HMR as state requirements" does not relate to railroads. Rather, it is based on another RSPA ruling dealing with highway vehicles, an area in which RSPA has indeed encouraged an active state role. *See* IR-17, 51 Red.Reg. at 20931.

Finally, although defendants assert that at least 12 other states have adopted the federal HMR as state requirements applied to railroads, there is no evidence that such statutes are being enforced, that their constitutionality has been tested or that Congress or the Department of Transportation has in any way sanctioned their existence.

Ohio has attempted to do precisely that which Congress sought to prohibit. Ohio Rev.Code §§ 4907.64 and 4905.83 grant to the PUCO the authority to establish both a statewide system of railroad safety standards that duplicate the regulations adopted by the Secretary of Transportation under the HMTA and a procedure

for enforcement of those standards by the PUCO, including the imposition of forfeitures of up to $10,000.00 for each day of each violation. The Ohio statutes and administrative regulations fall squarely within the preemption provisions of the FRSA because the Secretary of Transportation has adopted rules and regulations covering the same subject matter.

Plaintiffs' Motion For Partial Summary Judgment is well taken. Ohio Rev.Code §§ 4905.83 and 4907.64 and Ohio Admin.Code §§ 4901:2-7-1 through 4901:2-7-22 and 4901:3-1-10 are preempted by the Federal Railroad Safety Act of 1970 and plaintiffs are entitled to an order enjoining defendants from enforcing such provisions.

By this opinion and order the Court has resolved plaintiffs' claims that the Ohio statutes and administrative regulations at issue are preempted by the FRSA. However, the Court has not addressed plaintiffs' claims that the statutes and administrative regulations are preempted by the HMTA or that they violate the Commerce Clause because they impose an undue burden on interstate commerce. Nevertheless, the Court determines pursuant to Fed.R.Civ.P. 54(b) that there is no just reason for delay in entering final judgment for the plaintiffs granting the relief demanded in the complaint. In making this determination the Court has considered the following factors: The Court's findings on the issue of preemption under the FRSA is completely dispositive of this action; a determination of the remaining claims, particularly the claim that the Ohio statutes and rules impose an undue burden on interstate commerce, will require an evidentiary hearing and an extensive and complicated analysis of the facts and law which will be unnecessary if the case can be decided solely on the preemption issue; the claim of FRSA preemption is entirely separate and distinct from the remaining claims and there is no possibility that the reviewing court could be required to consider the same issue a second time; the interests of judicial economy will be served by an immediate appeal and the parties may be spared the expense of litigating moot issues; finally, both sides in this controversy, as well as the citizens of Ohio, have a legitimate interest in a prompt determination of the important issues presented by this case which may well be facilitated by an immediate appeal.

Plaintiffs' Motion For Partial Summary Judgment is granted. Defendants' Cross Motion For Partial Summary judgment is denied. The Clerk shall enter final judgment in favor of the plaintiffs,

permanently enjoining the defendants from enforcing Ohio Rev.Code §§ 4905.83 and 4907.64 and Ohio Admin.Code §§ 4901-2-7-1 through 4901:2-7-22 and 4901:3-1-10.

It is so ORDERED.

CSX TRANSPORTATION, INC., Consolidated Rail Corporation, Norfolk and Western Railway Company, and Grand Trunk Western Railroad Company, Plaintiffs-Appellees,

v.

The PUBLIC UTILITIES COMMISSION OF OHIO, and Thomas V. Chema, Ashley C. Brown, Gloria Gaylord, Alan R. Schriber, and Lenworth Smith, Jr., in their respective capacities as Chairman and Commissioners of the Public Utilities Commission of Ohio, Defendants-Appellants.

No. 88-4185.

United States Court of Appeals,
Sixth Circuit.

Argued Aug. 17, 1989.
Decided April 13, 1990.

Before GUY, BOGGS, and NORRIS, Circuit Judges.

BOGGS, Circuit Judge.

Plaintiff railroads sought and received summary judgment for declaratory and injunctive relief against defendants Public Utilities Commission of Ohio, its Chairman, and its Commissioners, against state regulation of hazardous materials transportation, claiming that such regulation was preempted by the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.* 701 F.Supp. 608. The defendants appealed, and we now affirm.

I.

The Hazardous Materials Transportation Act (49 U.S.C.App. § 1801 *et seq.*) (HMTA) governs the intermodal regulation of hazardous material transportation; the Secretary of Transportation (Secretary) has authority to promulgate rules and regulations under it. Under the HMTA, states can implement regulations governing the transportation of hazardous material if such regulations are

consistent with federal provisions promulgated under the HMTA. 49 U.S.C.App. § 1811(b).

Pursuant to the HMTA, Ohio enacted the Ohio Hazardous Materials Transportation Act (OHMTA) on September 26, 1988. *See* Am.Sub.H.B. No. 428, 1988 Ohio Legislative Service at 5-820 (Baldwin). The OHMTA authorized the Public Utilities Commission of Ohio (PUCO) to adopt and enforce as state requirements the federal rules regulating the intermodal transportation of hazardous materials; the statute provided in relevant part that "[t]he rules adopted under this section shall be consistent with, and equivalent in scope, coverage, and content to, the provisions of the 'Hazardous Materials Transportation Act'. . . ." Ohio Rev.Code Ann. § 4907.64.

On September 27, 1988, CSX Transportation Incorporated, Consolidated Rail Corporation, Norfolk & Western Railroad Company, and Grand Trunk Western Railroad Company (collectively, the Railroads) filed suit in the United States District Court for the Southern District of Ohio, Eastern Division, against the PUCO and its commissioners, Thomas V. Chema, Ashley C. Brown, Gloria Gaylord, Alan R. Schriber, and Lenworth Smith, Jr. (collectively, the PUCO). The Railroads operate in and through the state of Ohio, and thus would be subject to the proposed regulations.

The Railroads sought declaratory relief and temporary and permanent injunctive relief against the enactment of the OHMTA and its implementing administrative regulations on the ground that they are preempted by the Federal Railroad Safety Act (FRSA) and a burden of interstate commerce in violation of article I of the United States Constitution. The FRSA, 45 U.S.C. § 421 *et seq.*, regulates general railroad safety. The FRSA does not permit states to promulgate laws relating to railroad safety over subject matter on which the Secretary has already promulgated a rule. 45 U.S.C. § 434.

The PUCO informed the Railroads that the regulations enacted pursuant to the OHMTA would not become enforceable against railroads until December 10, 1988. In response to this information, the Railroads withdrew their request for a preliminary injunction and filed for partial summary judgment on the preemption issue on October 26, 1988. The Railroads sought to enjoin the PUCO permanently from enforcing the regulations; they

also sought a declaration that the statutes and regulations were subject to the FRSA preemption provision. The Railroads claimed that the FRSA expressed the intent of Congress to preempt state rules such as the challenged provisions of Ohio law.

On November 10, 1988, the PUCO filed a cross motion for partial summary judgment on the preemption issue raised by the Railroads. It contended that the FRSA preemption provision applies only to matters of general railroad safety, and not to the regulation of intermodal hazardous materials transportation, even when applied to railroads. The PUCO contended that the HMTA created a dual system of federal and state regulation, under which states could govern transportation of hazardous materials, by rail or otherwise, through laws consistent with their federal counterparts. 49 U.S.C.App. § 1811. The Ohio laws, it asserted, were within this sphere of state authority. It requested an order from the District Court finding Ohio Revised Code sections 4905.83 and 4907.64 valid and enforceable.

The court held a hearing on November 30, 1988, and concluded that the Ohio statutes in question constituted laws relating to "railroad safety" within the definition of the FRSA preemption provision. 45 U.S.C. § 434. On December 12, 1988, the district court granted the Railroads' motion for partial summary judgment and granted a premanent injunction. In particular, the court held that the FRSA preempted sections 4905.83 and 4907.64 of the Ohio Revised Code, and sections 4901:2-7-01 through 4901:2-7-22 and 4901:3-1-10 of the Ohio Administrative Code. The PUCO now appeals from this grant of summary judgment.

II.

In 1966, Congress created the Department of Transportation (DOT). *See* 49 U.S.C. §§ 1651-1660, as amended. The DOT received the authority under several laws previously vested in a number of government agencies and departments to regulate, among other things, the transportation of hazardous materials. P.L. 89-670, 49 U.S.C. 1651 (1966). The authority to regulate under one of these laws, the Explosives and Other Dangerous Articles Act, was transferred from the Interstate Commerce Commission. 49 U.S.C. § 1655(e)(4).

This authority to regulate, among other things, the transportation of hazardous materials transferred to the Secretary was delegated by statute to modal administrations (in this case, the Federal Railroad Administration and the Federal Highway Administration). The Federal Railroad Administration (FRA) had authority to promulgate hazardous material transportation regulations for railroads through its administration of the Explosives Act. 49 U.S.C. § 1655(f)(3)(A) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(A) (1974). The Federal Highway Administration (FHA) had similar authority for motor carriers. 49 U.S.C. § 1655(f)(3)(B) (1966), *amended by* 49 U.S.C. § 1655(f)(3)(B) (1974). In both cases, the Secretary had no power either to retain the authority or transfer it to a modal administration other than the FRA (for railroads) or FHA (for motor carriers). 49 U.S.C. § 1655(f)(3) (1966), *amended by* 49 U.S.C. § 1655(f)(3) (1974).

In 1970, Congress passed an omnibus bill which enacted, among other provisions, the Hazardous Materials Transportation Control Act of 1970 (HMTCA) and the FRSA. Pub.L. 91-458, 84 Stat. 971. The HMTCA was Congress's first attempt at establishing intermodal regulation of hazardous materials. The HMTCA directed the Secretary to establish facilities within the federal government; evaluate hazards surrounding the shipment of hazardous materials; establish a central reporting system for those hazards; and review all aspects of hazardous material transportation to increase the control and safety of such transportation. 49 U.S.C. § 1761 (repealed 1974).

The FRSA was enacted to govern railroad safety. The declaration of purpose of the FRSA states:

> The Congress declares that the purpose of [the FRSA] is to promote safety in all areas of railroad operations . . . and to reduce deaths and injuries to persons and to reduce damages to property caused by accidents involving any carrier of hazardous materials.

45 U.S.C. § 421. The FRSA allows states to retain some enforcement powers in the area of railroad safety. In relevant part, the preemption provision reads:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as *the Secretary* has adopted a

rule, regulation, order, or standard covering the subject matter of such State requirement.

45 U.S.C. § 434 (emphasis added). Thus, any state regulation over an area covered by the FRSA (whether consistent or not) is preempted. This preemption provision was debated vigorously in Congress prior to passage. The House Report accompanying the FRSA stated that some of the covered "railroad safety" laws ". . . are set forth in detail in appendix B of this report." H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4104, 4105. Appendix B lists, among other laws, the Explosives Act.

With the passage of another omnibus bill in 1974, true intermodal regulation of the transportation of hazardous materials came into being. Pub.L. No. 93-633, 88 Stat. 2156. This bill enacted the HMTA and amended the DOT enabling act. It also created an independent safety board to oversee the functions and performance of each of the modal administrations within the Department of Transportation. 49 U.S.C.App. §§ 1901-1902.

The HMTA amended the DOT enabling act to prohibit the Secretary from delegating the functions, powers, and duties to administer the Explosives Act to the FRA or the FHA. Pub.L. 93-633, § 113(e)(1), (2). The amended provision read in relevant part for the FRA:

> The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than [the Explosives and Other Dangerous Articles Act]).

49 U.S.C. § 1655(f)(3)(A). Thus, the regulation of the transportation of hazardous materials moved from a modal to an intermodal basis.

The preemption provision of the HMTA differs from that of the FRSA. The HMTA provides that:

> . . . any requirement of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA], is preempted.

49 U.S.C. § 1811(a). Thus, unlike the preemption provision of the

FRSA, which forbids state regulation on subject matter on which the Secretary has already adopted a regulation, the HMTA allows state regulations which are consistent with federal regulations.

In 1980, Congress amended the FRSA. Pub.L. No. 96-423, 94 Stat. 1811 (amending 45 U.S.C. §§ 431-433). Congress amended Section 425 of the FRSA to allow greater (but still limited) state participation in investigative and surveillance activities relating to railroad safety. 45 U.S.C. § 435(g). The HMTA was not listed as one of these laws. In regard to this omission, the House Report stated that, "[s]ince the [HMTA] is not directed specifically and solely at railroad safety, that Act is not within the scope of the amendment." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. CODE CONG. & ADMIN.NEWS 3830, 3837-38.

III.

The question before us is simply this: should a train carrying a load of hazardous waste be considered a railroad which happens to be carrying hazardous waste (thus suggesting application of the FRSA preemption provision) or hazardous waste which happens to be carried by rail (thus suggesting application of the HMTA preemption provision)? The Committee report to the 1974 Act states:

> The intent of the Committee in these provisions [the HMTA] is to consolidate in the Department of Transportation the [sic] certain basic functions with respect to regulated hazardous materials, while the enforcement of the regulations pertaining to the shippers and carriers of hazardous materials remains delegated to the particular Administration within DOT having jurisdiction over the mode by which such materials move.

H.R.Rep. No. 1083, 93d Cong., 2d Sess., 1974 U.S. CODE CONG. & ADMIN.NEWS 7669, 7681. We find it clear from this language, and the legislative history behind it, that the purpose of the HMTA was to consolidate regulation of hazardous material transportation at the Secretarial level, and not to remove such regulation of hazardous material transportation by rail from the preemption provision of the FRSA.

Although we credit the PUCO's compelling argument that the creation of the HMTA in 1974 removed promulgation (though not enforcement) of regulations under the Explosives Act from the FRA, we do not believe that such removal changes the fact that FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary*, whether or not such regulations are promulgated by the FRA through power delegated by the Secretary. *See* 45 U.S.C. § 434. Clearly, the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary directly, not by the FRA.

We further find the PUCO's argument concerning removal of regulatory authority from the FRA by the HMTA unpersuasive in light of the plain and much-discussed preemption provision of the FRSA. *See, generally, Hearings Before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970). Repeal or amendment of this preemption provision as it related to the transportation of hazardous materials was not discussed during the passage of the HMTA. In giving the Secretary authority to promulgate regulations involving the intermodal transportation of hazardous materials under HMTA, we do not believe that Congress concurrently repealed the broad historic federal preemption of state railroad regulation. *See National Association of Regulatory Commissioners v. Coleman*, 542 F.2d 11 (3rd Cir.1976).

We find that the language of the FRSA, "any law . . . relating to railroad safety," 45 U.S.C. § 434, applies to the HMTA as it relates to the transportation of hazardous material by rail. The plain meaning of a statute must be given great weight. *Watt v. Alaska*, 451 U.S. 259, 265-66, 101 S.Ct. 1673, 1677-78, 68 L.Ed.2d 80 (1981). We further note that Congress examined the problems of hazardous material transportation by rail within the context of a more general discussion of railroad safety. H.R.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN.NEWS 4104, 4107.

To find that a later statute has repealed an earlier one, we have required that "the later law designates the statute repealed in such manner as to leave no doubt as to what statute is intended." *Equitable Life Assur. Soc. of U.S. v. Grosvenor*, 426 F.Supp. 67, 71 (W.D.Tenn.1976), *aff'd*, 582 F.2d 1279 (6th Cir.1978). The HMTA does not fulfill this test. Repeal by implication is disfavored.

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 104 S.Ct. 2862, 2878, 81 L.Ed.2d 815 (1984).

The PUCO contends that courts reviewing questions of federal supremacy must "start with the assumption that the historic police power of the states is not to be superseded by federal enactments 'unless that was the clear manifest purpose of Congress,' " citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). We hold that the FRSA revealed such a purpose and that the enactment of the HMTA did not demonstrate otherwise. In fact, *Santa Fe Elevator* also instructs us that one test of preemption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Id.* at 236, 67 S.Ct. at 1155. In this case, it is clear that matters of railroad safety are governed by the preemption provision of the FRSA.

Further, the PUCO argues that preemption is precluded where a state acts within its sphere of authority under a dual system of federal and state regulation established by Congress. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370-78, 106 S.Ct. 1890, 1899-1903, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 212-17, 103 S.Ct. 1713, 1726-29, 75 L.Ed.2d 752 (1983). However, we find that the system of regulation created by the FRSA and HMTA is of a different character than that at issue in *Louisiana Public Service Comm'n*. In that case, the reservations of authority to the state were explicit. *Louisiana Public Service Comm'n* 476 U.S. at 370, 106 S.Ct. at 1899. Thus, the Court found that such a clear reservation prevented federal preemption of those areas.

In this case, federal power to regulate transportation of hazardous materials is absolute; state power is limited. Thus, unlike *Louisiana Public Service* where the Court was concerned that "... a federal agency may preempt state law only when and if acting within the scope of its congressionally delegated authority," 476 U.S. at 374, 106 S.Ct. at 1901, we have no qualms about the scope of the DOT's authority to promulgate hazardous material transportation regulations. The only question is whether the PUCO also may do so for railroads.

In *Pacific Gas & Electric*, the state had express power to regulate the economics of nuclear production. 461 U.S. at 205-06, 103 S.Ct. at 1722-23. The federal law, the Atomic Energy Act, did

not explicitly prohibit states from exercising economic regulation. The question before the *Pacific Gas & Electric* Court was whether federal regulatory authority over nuclear production preempted a state regulation which arguably came within the express state authority. Again, the question before us is different. The federal government clearly has the power to regulate all aspects of railroad safety; state power is limited. Thus, the HMTA does not present the same type of dual regulatory authority presented in *Louisiana Public Service* or *Pacific Gas & Electric.*

We agree with the PUCO that our preemption analysis "is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch v. Ware,* 414 U.S. 117, 127, 94 S.Ct. 383, 390, 38 L.Ed.2d 348 (1973), *quoting Silver v. New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963) (citation omitted). However, we do not agree with the PUCO's interpretation of this language in this case. A failure to follow the preemption provision of the HMTA in no respect ousts the HMTA. In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous material transportation on an intermodal basis are both respected.[1] The decision of the district court is AFFIRMED.

---

[1] Finding that the regulations issued pursuant to the OHMTA are preempted by the preemption provision found in the FRSA, we find it unnecessary to address the questions of whether the Ohio regulations are also preempted by the preemption provision found in the HMTA.

(3)

No. 90-95

AUG 29 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SAMUEL H. PORTER, *Counsel of Record*
PATRICK J. SMITH
ROBERT W. TRAFFORD
KATHLEEN McDONALD O'MALLEY
JANET J. HENRY
PORTER, WRIGHT, MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
Attorneys for Respondents

Of Counsel:
A. GAYLE JORDAN
Norfolk & Western Railway Co.
SALLY J. KIRCHER
CSX Transportation, Inc.
JANET SCAGNELLI
Consolidated Rail Corporation
MARY P. SCLAWY
Grand Trunk Western Railroad Co.

Question Presented

Whether the Court of Appeals correctly concluded that §434 of the Federal Railroad Safety Act, 45 U.S.C. §434, preempts state regulation of the transportation of hazardous materials by rail.

LIST OF PARTIES AND RULE 29.1 LIST OF AFFILIATES

The parties before the Court of Appeals and this Court are all listed in the caption.

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
The Baltimore and Philadelphia Railroad Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company;
The Cleveland Terminal & Valley Railroad Company;
Dayton and Michigan Railroad Company;
Dayton and Union Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company;
Mid-Allegheny Corporation

Norfolk and Western Railway Company is a wholly-owned subsidiary of Norfolk Southern Corporation, a publicly-owned corporation. The following majority-

owned subsidiaries of Norfolk Southern Corporation have public stockholders:

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
The North Carolina Midland Railroad Company
The South Western Railroad Company
Southern Railway Company
State University Railroad Company
Wabash Railroad Company
Yadkin Railroad Company

Grand Trunk Western Railroad Company is a wholly owned subsidiary of Grand Trunk Corporation which is owned by Canadian National Railways, a Canadian crown corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

No. 90-95

IN THE

Supreme Court of the United States

October Term, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents CSX Transportation, Inc., Consolidated Rail Corporation, Norfolk and Western Railway Company and Grand Trunk Western Railroad Company, respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case. The opinion of the Sixth Circuit is reported at 901 F.2d 497. The opinion of the United States District Court for the Southern District of Ohio, which was affirmed by the Sixth Circuit, is reported at 701 F.Supp. 608.

STATEMENT OF THE CASE

On September 26, 1988, the Ohio General Assembly enacted the Ohio Hazardous Materials Transportation Act ("OHMTA"). That Act authorized the Public Utilities Commission to adopt and enforce regulations relating to the transportation of hazardous materials by all modes of transportation, including rail. On September 27, 1988, Respondents brought this action to enjoin enforcement of those provisions of the OHMTA applicable to rail carriers and to obtain an order from the district court declaring all such provisions invalid because they are preempted by federal law and are an undue burden on interstate commerce. Specifically, Respondents sought an order from the district court (1) declaring Ohio Revised Code ("O.R.C.") §§4905.80, 4905.81, 4905.83 and 4907.64, and all regulations issued pursuant thereto, invalid as applicable to rail carriers under the United States Constitution Article VI, Clause 2 (the Supremacy Clause) and Article I, Clause 3, Section 8 (the Commerce Clause) and the express preemption provisions of both the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. §421 *et seq.* and the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §1811 *et seq.*, and (2) preliminarily and permanently enjoining the enforcement of each such statute and regulation as to rail carriers.

Upon representation by the Ohio Public Utilities Commission ("PUCO") that regulations enacted pursuant to the OHMTA would not become enforceable against rail carriers until December 10, 1988, Respondents withdrew their request for preliminary injunctive relief and submitted a Motion for Partial Summary Judgment on October 26, 1988. Respondents sought a declaratory judgment and requested that the PUCO and its Chairman and Commissioners (hereinafter, collec-

tively "the PUCO") be permanently enjoined from enforcing the Ohio statutes and regulations because state regulation of the transportation of hazardous materials by rail is preempted by the explicit terms of both the FRSA and the HMTA.

On November 10, 1988, the PUCO filed a Cross-Motion for Partial Summary Judgment. The PUCO argued that the Ohio statutes and regulations are not preempted by the FRSA or the HMTA and are, in fact, specifically authorized by the HMTA. On that basis, the PUCO requested an order from the district court declaring O.R.C. §§4905.81, 4905.83 and 4907.64, and all regulations thereunder, valid and enforceable under the Supremacy Clause.

The preemption provision of the FRSA reads:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. *A state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order or standard covering the subject matter of such state requirement.* A state may adopt or continue in force an additional or more stringent standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. §434 (emphasis added). The operation of this provision is straightforward: if no federal regulation covers a railroad safety matter, the states may regulate; if federal regulation addresses a "subject matter" which

relates to "railroad safety," the states are preempted from regulating unless they meet the three part test of §434 -*ie.*, state regulation is more stringent and addresses a local safety hazard, state regulation is not incompatible with federal law, and state regulation does not impose an undue burden on interstate commerce. *See, e.g., Missouri Pacific Ry. Co. v. Railroad Comm. of Texas*, 671 F.Supp. 466, 671 (W.D. Tex. 1987), *aff'd.*, 850 F.2d 264 (5th Cir. 1988).

There is no question that the regulations issued pursuant to the OHMTA address a "subject matter" as to which the Secretary has already "adopted a rule, regulation, order or standard." Indeed, except in a few material respects, the Ohio regulations governing the transportation of hazardous materials are identical to those adopted by the Secretary pursuant to the HMTA. There is also no question that the OHMTA regulations could never satisfy the three part test for an exception to §434 because they were enacted on a state-wide, rather than local, basis. Accordingly, all parties and both of the lower courts agree that the issue which is determinative of the applicability of the preemptive bar of §434 is whether regulations governing the transportation of hazardous materials by rail adopted under the HMTA are regulations governing an area of "railroad safety" under the FRSA.

Following a hearing on November 30, 1988, the district court concluded that the Ohio statutes and regulations governing the transportation of hazardous materials by rail *do* constitute laws relating to "railroad safety" and, thus, are preempted by the explicit preemption provision of the FRSA, 45 U.S.C. §434. *CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 701 F.Supp. 608, 617 (S.D. Ohio 1988). Having concluded that those statutes and regulations are preempted, the

court declared them invalid under the Supremacy Clause and entered a permanent injunction against their enforcement on December 10, 1988. *Id.* 701 F.Supp. at 618.

The district court found that its decision as to preemption under the FRSA was determinative of the invalidity and unenforceability of the Ohio provisions and that further inquiry was, thus, unnecessary. *Id.* Hence, without considering whether the OHMTA regulations were also preempted under the preemption provision of the HMTA, the district court entered a Rule 54(b) order finding "no just reason for delay" and the matter was appealed to the United States Court of Appeals for the Sixth Circuit.[1]

In an opinion issued April 13, 1990, the Sixth Circuit affirmed the decision of the district court in its entirety, finding:

1. that the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary of Transportation

---

[1]The HMTA preemption provision is narrower than that of the FRSA. It provides:

> Any requirement of a State or political subdivision thereof, which is inconsistent with any requirement set forth in [the HMTA], or in a regulation issued under [the HMTA], is preempted.

40 U.S.C. §1811(a). Because the OHMTA requirements differ in certain material respects, most particularly with respect to the imposition of penalties, from those issued under the HMTA, Respondents contend that the Ohio regulations are inconsistent with their federal counterparts and are, thus, also preempted under the preemption provision of the HMTA. Because they agreed that the Ohio regulations are barred by §434 of the FRSA, neither of the courts below reached the issue of whether those regulations were also barred by the HMTA.

directly rather than by the Federal Railroad Administration (*CSX Transportation, Inc., v. Public Utilities Commission of Ohio*, 901 F.2d at 497, 501);

2. that, in giving the Secretary of Transportation authority to promulgate regulations involving the intermodal transportation of hazardous materials under the HMTA, Congress did *not* concurrently repeal the broad historic federal preemption of state railroad regulation (*Id.*); and

3. that, as a result of 1 and 2 above, the language of the preemption provision in the FRSA, "any law . . . relating to railroad safety," applies to the HMTA as it relates to the transportation of hazardous materials by rail and, thus, operates to preempt state regulation of that subject matter. (*Id.*).

REASONS FOR DENYING THE WRIT

A. THE DECISIONS OF THE LOWER COURTS ARE IN ACCORD WITH THE DECISIONS OF EVERY OTHER COURT TO HAVE CONSIDERED THE ISSUE

The district court and court of appeals in this case are not alone in concluding that regulations adopted by the Secretary pursuant to the HMTA constitute regulations "by the Secretary" regarding an area of "railroad safety" and that they therefore preempt state regulation as to that subject matter. Every court to consider the question has reached the same conclusion.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Ill. Commerce Comm.*, 453 F.Supp. 920 (N.D.Ill. 1977) the District Court for the Northern District of Illinois considered the preemptive effect of both the FRSA and

the HMTA on regulations issued by the Illinois Commerce Commission governing the handling of tank cars containing hazardous materials. The court concluded that any action taken by the Secretary, whether under the HMTA *or* the FRSA, must be considered in determining whether the Secretary has "covered the subject matter" addressed by state regulation. The court said:

> However, these statutes do not require the overly technical interpretation which would subject orders and regulations issued by the Secretary under one law to a different preemption standard than those under another. [FRSA and HMTA] The Railroad Safety Act of 1970 provides that state action is preempted when the Secretary has issued orders or regulations covering the field. *This is not limited merely to those promulgated under that Act, but refers instead to any action taken by the Secretary* . . . Any more narrow interpretation of the Railroad Safety Act would frustrate its stated purpose of establishing uniform national standards.

453 F.Supp. at 924. (Emphasis added).

Similarly, in *Missouri Pacific Ry. Co. v. Railroad Comm. of Texas*, 671 F.Supp. 466 (W.D.Tex. 1987), *affd.*, 850 F.2d 264 (5th Cir. 1988), the court explained:

> §434 refers to acts by "the Secretary," referring to the Secretary of Transportation, and does not confine itself to acts pursuant to the FRSA. Thus, an act by the Secretary pursuant to, for example, the HMTA could preempt state law under the terms of §434.

671 F.Supp. at 471 n.4 and 482.

Finally, in *CSX Transportation, Inc. v. City of Tullahoma*, Case No. Civ. 4-87-47, slip op. at 11 (E.D.Tenn. Feb. 17, 1988), Judge Jarvis stated:

> . . . Transportation of hazardous materials is regulated by the Secretary of Transportation under both the HMTA and the FRSA. Although the preemption standard is somewhat different under the two acts, under the FRSA, state action is preempted when the Secretary has issued orders or regulations covering the field. *Preemption is not limited to those regulations promulgated under the FRSA, but refer instead to any other rule, regulation, order, or standard covering the subject matter and adopted by the Secretary.*

Id. (Emphasis added).

Thus, the issue presented to this Court is not one that has confused the various lower federal courts or has engendered debate among them. It is an issue which has resulted in uniform, unequivocal findings that the preemption provision of the FRSA applies with equal force to all regulations issued by the Secretary of Transportation, including those issued pursuant to the HMTA. This fact alone militates strongly against any need for consideration by this Court.

B. THE DECISIONS OF THE LOWER COURTS ARE CONSISTENT WITH ALL CONGRESSIONAL PRONOUNCEMENTS ON THE ISSUE

1. The Decisions in This Case are the Only Ones Which Will Further the Congressional Goal of National Uniformity in the Regulation of Rail Safety

The first sentence of §434 of the FRSA states unequivocally Congress' objective with respect to *all* rail-

road safety laws: national uniformity. Congress declared that "laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. §434. The legislative history and enforcement structure of the FRSA confirm that, given the uniquely interstate character of railroads, Congress determined that national uniformity was critical not just in the adoption of standards, but, importantly, also in the interpretation, application and enforcement of those standards as well.

The House Report accompanying the 1970 Act gives a detailed description of the interstate character of railroad systems, and persuasively states the resulting need for national uniformity in both regulation and enforcement:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. *It is a national system* . . . [T]he vast bulk of railroad mileage, and operations thereof, are by companies whose operations extend over many State lines . . . The integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operation rules, signal systems, power supply systems, and communication systems of a single company normally cross many State lines. *To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.*

H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted* in, 1970, *U.S. Code Cong. & Admin. News* 4104, at 4110-4111.

This point is reiterated often in the relevant legislative history:

> The Committee does not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of *enforcement* in 50 different judicial and administrative systems. *Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the nation's rail system to make all enforcement Federal in nature.*

Id. at 4409 (emphasis added).

> It is the policy of Congress that rail safety regulations be nationally uniform to the extent possible [O]nce the Secretary [of Transportation] has prescribed a uniform national standard, the State would no longer have authority to establish statewide standards with respect to rail safety.

Id. at 4116-17.

This goal of national uniformity was carefully integrated into the statutory framework of the FRSA. The FRSA accomplishes its objective in two specific ways: (1) it preempts *all* state and local laws relating to rail safety to the extent the Secretary has promulgated regulations covering the same subject matter; and, (2) through §435, it returns to the states a very limited role with respect to some, *but not all*, of the areas as to which there is preemption. Thus, the role of the states under the FRSA is strictly limited to surveillance and inspection activities, 45 U.S.C. §435(a), while Congress reserved to the Secretary the *exclusive* power to assess and compromise penalties, and, except in very limited circumstances, to seek injunctive relief.

The concept of preemption of state regulation accompanied by severely limited state involvement in enforcement of federal requlations was central to the Congressional intent in passing the FRSA. Indeed, the legislative history makes plain that the question of what role would be permitted the states in the regulation of railroad safety was the most thoroughly debated portion of the FRSA. Thus, for example, Representative Springer observed during the hearings on the FRSA before the House Subcommittee on Transportation and Aeronautics:

> *I think this [preemption] is the great area of problem*, Mr. Secretary, where there would be a possibility, this is just opinion, but I think I can read that this would be the area probably where we might have the most agreement or disagreement about what ought to be done. *I think this is really what the turning point of the bill will be, in my opinion.*

See, Hearings Before The House Subcommittee on Transportation and Aeronautics, May 17, 19, 22 and 23, 1970, regarding the Federal Railroad Safety and Hazardous Materials Control Legislation, U.S. Government Printing Office, at p.43.

Similarly, Representative Kuykendall captured the sense of Congress when he noted:

> There is not much disagreement with this bill and *it seems to me that almost the entire area of disagreement has now been pretty well isolated.* Disagreeing with your position on the overall goals of this bill would be just like disagreement with God and motherhood. You just don't do it. *So lets get to the area of discussion of what we are faced with, the problem of preemption and authority of the different levels of regulatory agencies.*

Id. at 141.

Thus, "[t]he legislative history of the FRSA shows that the issue of Federal preemption was vigorously debated, leaving a clear record of Congressional intent for virtually complete preemption in the area of railroad safety laws." *Norfolk & Western Railway Company* v. *The Public Utilities Commission of Ohio*, 727 F.Supp. 367, 369 (S.D.Ohio 1990) (finding that §434 of the FRSA preempts state regulations mandating walkways at rail crossings where the Secretary had decided not to mandate the same).

The district court and court of appeals in this case both explicitly recognized that the challenged Ohio statutes turned Congressional intent on its head. As the district court found, "Ohio has attempted to do precisely that which Congress sought to prohibit." *See, CSX Transportation, Inc.* v. *The Public Utilities Commission of Ohio*, 701 F.Supp. at 617. The decisions below correctly protect Congressional objectives by prohibiting the State of Ohio from adopting regulations similar to those promulgated by the Secretary relating to the transportation of hazardous materials by rail, and from imposing a mechanism for enforcement of those laws by state officials through the assessment of fines and forfeitures and through the prosecution of administrative and judicial proceedings.

Moreover, the implications of Ohio's actions go well beyond authorizing regulation and enforcement at the state level. Had the lower courts accepted the PUCO's contentions as true, regulation of the rail transportation of hazardous materials could conceivably occur at *all* non-federal levels, bogging the nation's railroads, so national in scope and character, in a welter of local regulations and enforcement schemes. Such a

result would have been at extreme odds with the Congressional goal of national uniformity in this area.

As the court stated in *City of Covington, Kentucky v. The Chesapeake & Ohio Railway Co.*, 708 F.Supp. 806, 809 (E.D. Ky. 1989), *quoting, Consolidated Rail Corp. v. Smith*, 664 F.Supp. 1228, 1238 (N.D. Ind. 1987), a case in which a local speed ordinance was held to be preempted:

> Congress was concerned that the existence of fifty separate regulatory systems in the fifty states would undermine safety. If so, separate regulation by every city, village, township, or hamlet along the mainline would undermine safety infinitely more.

Thus, it is apparent that the lower courts carefully examined and took their lead from all relevant Congressional expressions of policy in reaching their decisions in this case. This conservative adherence to the well and oft-expressed intentions of Congress certainly does not demand further scrutiny by this Court.

2. The Lower Courts' Conclusion That Congress Did Not Remove the Transportation of Hazardous Materials by Rail From the Ambit of "Railroad Safety" Under §434 Was Guided by and Consistent With the Dictates of This Court Regardinq Interpretation of Congressional Intent

The PUCO does not dispute that when Congress enacted the FRSA in 1970 and used the phrase "laws . . . relating to railroad safety" in the preemption provision therein, regulations governing the transportation of hazardous materials were consciously and ex-

pressly included within that language. The legislative history and structure of the FRSA make that conclusion irrefutable. The PUCO contends, however, that the legislature subsequently altered that legislative scheme and *removed* hazardous materials regulation from the universe of rail safety matters addressed under §434. Both the district court and the Sixth Circuit concluded that adopting the PUCO's position would demand that they ignore relevant and specific guidelines for the resolution of questions regarding legislative intent dictated by this Court.

Both the district court and the Sixth Circuit concluded that, since there is no language in the FRSA or the subsequently enacted HMTA, or in the legislative history of either, which explicitly states that, by virtue of the HMTA, states are now free to regulate in areas from which they had been previously excluded under §434, the PUCO's argument must be viewed as one urging the "implied repeal" of §434.[2] And, both recognized that it is a fundamental principle of statutory construction that the implied repeal of an earlier statute by mere enactment of a later, even potentially conflicting one, is disfavored and should be avoided whenever possible. *See e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984) (Supreme Court has consistently rec-

---

[2]A statute is expressly repealed [only] when the later law "*designates the statute repealed in such manner as to leave no doubt as to what statute is intended.*" *Equitable Life Assur. Soc. of U.S. v. Gresvenor*, 426 F.Supp. 67, 71 (W. D.Tenn. 1976), *affd.* 582 F.2d 1279 (6th Cir. 1978), *cert denied*, 439 U.S. 1116 (1979) (emphasis added). *See also U.S. v. Hansen*, 772 F.2d 940 (D.C. Cir.), *cert. denied*, 475 U.S. 1045 (1985) (courts should assume Congress will expressly designate *each of the provisions* of former related statutes whose application it wishes to suspend by later statutory enactment). There is absolutely no evidence of an express repeal of §434, either through the enactment of the HMTA or otherwise.

ognized that repeals by implication are disfavored); *TVA v. Hill*, 437 U.S. 153, 189-90 (1978) (disfavor of implied repeal is "cardinal rule"; intent to repeal or amend must be "manifest"); *U.S. v. United Continental Tuna Corp.*, 425 U.S. 164, 168-69 (1976) (disfavor of implied repeal carries great weight; court should be hesitant to infer that Congress meant to invade or narrow scope of pre-existing statute without explicitly expressing intent to do so).

It was on these dictates of this Court that the lower courts based their conclusion that they must find a "clear" and "manifest" intent by Congress to repeal or amend §434 before they could conclude that the regulation of the transportation of hazardous materials by rail was no longer to be considered an area of "railroad safety." Not only were the lower courts unconvinced that Congress had manifested any such intent, they concluded that there was, in fact, evidence of a contrary intention — *i.e.*, to preserve the applicability of the preemptive effect of §434 in this context.

The PUCO's petition, as did its briefs in the courts below, seeks to make much of the asserted shift from a "modal" to an "intermodal" approach to the regulation of hazardous materials and the transfer of regulatory authority from the FRA (where it resided by delegation from the Secretary) to the Secretary. The PUCO's arguments were rejected by the courts below for good reason. As the Sixth Circuit explained:

> Although we credit the PUCO's compelling argument that the creation of the HMTA in 1974 removed promulgation (though not enforcement) of regulations under the Explosives Act from the FRA, we do not believe that such removal changes the fact that FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated*

> *by the Secretary,* whether or not such regulations are promulgated by the FRA through power delegated by the Secretary. See 45 U.S.C. §434. Clearly, the HMTA is a law relating to railroad safety, even if regulations pursuant to it are promulgated by the Secretary directly, not by the FRA.
>
> 901 F.2d at 501.

Similarly, the trial court observed:

> Defendants point out that the HMTA transferred regulatory authority over hazardous materials transportation from the Federal Railroad Administration (FRA) to the Secretary of the Department of Transportation and argue that this signifies a Congressional intent that such regulations should not be governed by the preemption provisions of the FRSA. Defendants overlook the fact that the preemption provisions of the FRSA apply to rail safety measures adopted by the Secretary, not the FRA. By transferring hazardous materials regulation from the FRA to the Secretary, Congress did not in any way separate railroad safety regulation from hazardous materials regulation, rather, the Secretary is responsible for both. Indeed, as noted, the FRSA preemption provision is tied to railroad safety regulations adopted by the Secretary, not by the FRA. Defendants' argument would make sense only if FRSA preemption was in fact tied to regulations adopted by the FRA and plainly it is not.
>
> 701 F.Supp. at 608.

The lower courts also recognized that Congress did not alter the scope of §434 following judicial and administrative applications of §434 to regulations promulgated by the Secretary pursuant to the HMTA.

Congress amended the FRSA and the HMTA in 1980. When it did so, it had been made expressly aware that the Department of Transportation ("DOT"), the federal agency that promulgates regulations under the HMTA, believed that the FRSA preemption provision applied to regulations relating to the transportation of hazardous materials *by rail*:

> The preemption provisions of the Hazardous Materials Transportation Act operate to preempt any State or local requirement that is "inconsistent" with the Federal regulation. Unless it is "inconsistent," a State or local requirement is not preempted. *In the case of a State or local restriction directed at rail transport, there is a second Federal statutory provision that acts to further limit the legal authority of States and localities. Under the Railroad Safety Act*, a State or locality is expressly preempted from any "additional or more stringent" rail safety requirement unless it is "necessary to eliminate or reduce a local safety hazard."

Hazardous Materials Transportation Act Amendments: Joint Hearing Before the Subcommittee on Surface Transportation and Subcommittee on Aviation of the Committee on Public Works and Transportation on H.R. 3502, 96th Cong., 1st Sess. 33 (1979).

At that point, Congress was also presumably aware of judicial interpretations regarding the interplay of the FRSA and the HMTA concluding that the preemption provision in the former applied to regulations issued pursuant to the latter. Indeed, given that *Atchison, Topeka & Sante Fe Co. v. Ill. Commerce Commission*,[3] *supra*, which reaches the same result reached by the lower

---

[3]Significantly, the United States intervened on the side of the plaintiff railroads in *Atchison*. See, 453 F.Supp. at 922.

courts in this case, had been decided three years earlier, Congress is *deemed by law* to have been aware of the *Atchison* holding when it addressed these statutes in 1980. *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir.), *cert. denied*, 464 U.S. 1007 (1983), *citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) ("Congress is deemed to know executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning . . . ") *See also, Cannon v. University of Chicago* 441 U.S. 677, 696-97 (1979); *St. Regis Mohawk Tribe, New York v. Brock* 769 F.2d 37, 50 (2d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

As precedent from this Court dictates, Congress' failure to amend the FRSA or HMTA preemption provisions in response to either the *Atchison* holding or the DOT's advice regarding the construction of those provisions, or to in any way rebut or reject the judicial and administrative interpretations given to the interrelationship between those Acts, must be read as acceptance of those interpretations. *See CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 701 F.Supp. at 615-16.

Moreover, not only did Congress not act to change the FRSA or the HMTA in response to these judicial and administrative interpretations, but, instead, it actually reaffirmed them. In 1980, Congress added a "whistle blower" provision to the FRSA, and included in that provision a definition of "railroad safety law" that expressly included the HMTA. *See*, 45 U.S.C. §441(e). The statutes listed in that section (the HMTA and those laws under the jurisdiction of the Secretary pursuant to 49 U.S.C. §1655(1), (2) and 6(A)) are the same as those included in Appendix B to the 1970 legislative history

and referred to there as the laws relating to railroad safety. The only difference is that the HMTA is substituted for its predecessor, the Explosives Act. *See*, 901 F.2d at 500; 701 F.Supp. at 613. Thus, Congress' definition of railroad safety laws in 1980 was precisely the same as in 1970 and plainly included laws governing the transportation of hazardous materials by rail.

Thus, the lower court decisions which the PUCO asks this Court to review are not only consistent with all other judicial decisions on the issue and with Congress' desire to further the goal of nationally uniform regulation of rail safety, they are also consistent with the most recent administrative and legislative pronouncements on the precise question put to those courts.

C. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

1. The Supreme Court Pronouncements to Which the PUCO Refers are Neither Controlling Nor Relevant

The PUCO contends that this Court must grant certiorari to review the Sixth Circuit's decision in this case because that decision is inconsistent with two earlier decisions of this Court on the issue of federal preemption: *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) and *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190 (1983). Not only does the Sixth Circuit decision in this case not create a conflict with these precedents which is worthy of this Court's review, but these precedents are not even relevant to the preemption analysis at issue in this case.

The *Louisiana* case involved the interpretation of a *single* statute in which *exclusive* jurisdiction over the

regulation of interstate wire and radio communications had been granted to the federal government and *exclusive* jurisdiction over intrastate communications of that nature had been granted to the states. When the Federal Communications Commission dictated depreciation methods for telephone plants and equipment, the question arose whether that act preempted the states from dictating the use of alternative methods of depreciation in connection with the establishment of intrastate telephone rates. This Court concluded that, in the face of the explicit and separate grants of authority to the respective spheres of government within the single statute at issue, the mere fact that a federal agency had chosen to act on an issue first could not forever prohibit the states from acting in the area of authority granted to them.

That case is simply not this one. First, it does not involve, as here, the interpretation and determination of the interplay between two competing federal preemption provisions addressing overlapping subject matters. Second, it does not involve, as here, a situation in which the federal government has been granted broad regulatory authority over *an entire subject matter* — *i.e.*,"railroad safety," and where the "reservation of authority" to the states, to the limited extent it occurs, not only expressly overlaps with that already granted to the federal government (as opposed to being reserved in a separate sphere of authority), but also was made in the face of Congressional recognition that that authority would be limited whenever and to the extent it conflicted with the broad federal authority outlined in the FRSA.

The *Pacific Gas* case is equally inapposite. There, the Court again was faced with grants of authority within a *single* statute. The federal government was

granted the authority to build nuclear power plants and exclusive authority to regulate their safety. The power to promulgate non-safety regulations for such facilities was expressly reserved to the states in that same enactment. The question presented was whether the state could regulate nuclear facilities for economic purposes (as opposed to safety purposes) in a manner which imposed requirements which were more stringent than those the federal government had seen fit to implement. The Court concluded that the single statutory scheme of dual regulation at issue there had explicitly permitted state regulation in the sphere in which the state sought to regulate, no matter what the applicable federal agency had done under its independent grant of authority.

Again, that is not this case. The issue here is the interplay between *two separate federal preemption provisions*, including one that preempts state regulation over an entire subject area, and a consciously and strictly limited non-exclusive role for the states. The issues are different. As both of the lower courts and every other court to consider the issue have decided, the results should differ as well.

2. The Lower Court Decisions Were Dictated By This Court's Admonitions Regarding the Proper Approach to the Reconciliation of Two Potentially Conflicting Federal Statutes

Both of the lower courts recognized that when hazardous materials are transported by rail, that act logically is governed both by the FRSA, an act addressing itself to all aspects of rail transportation, and the HMTA, an act addressing itself to all forms of hazardous materials transportation. *See, CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 901 F.2d at 501. Both

courts also recognized, however, that, when faced with overlapping and even potentially conflicting statutes, a situation *not* present in either the *Louisiana* or *Pacific Gas* case, their role is not to choose one statute over the other or assume that an implied repeal of the earlier one was intended, but to seek to harmonize the two and attempt to give effect to any overriding Congressional intent.

As noted by the Ninth Circuit in adhering to clear Supreme Court pronouncements on the issue,

> [W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard *each* as effective. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1975), *quoting Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2472, 41 L.Ed. 290 (1974).

Get Oil Out!, Inc. v. Exxon Corp., 586 F.2d 726, 729 (9th Cir.1978). (Emphasis added).

This Court recently applied these principles in *Ruckelshaus v. Monsanto*, 476 U.S. 986 (1984). There, the Court was faced with an alleged conflict between the Tucker Act, 28 U.S.C. §1491, and the later Federal Insecticide, Fungicide and Rodenticide Act ("FIRFA"), 7 U.S.C. §136, *et. seq.* FIRFA limited the remedy for the taking of a property interest under that Act to resort to the Environmental Protection Agency. Despite this clear limitation, the Supreme Court applied the principles articulated above, and concluded that FIRFA should not be read to have impliedly repealed the Tucker Act's grant of jurisdiction to the district courts with respect to "taking" claims, especially in light of Congress' overriding concern with providing compensation to victims of a governmental taking. Hence, even though the statute was not written that way, this Court

concluded that FIRFA's remedy provision was to be interpreted as a requirement that administrative remedies be exhausted prior to resort to a Tucker Act claim.

Applying these principles to the instant case, the district court concluded that:

> the most logical way to resolve any conflict is to give effect to the specific preemption language of the FRSA (which by its literal language applies to all rail safety regulations adopted by the Secretary) while applying the more liberal preemption standard of the HMTA to regulations adopted with respect to other modes of transportation.

CSX Transportation, Inc. v. The Public Utilities Commission of Ohio, 701 F.Supp. at 614. The Sixth Circuit similarly concluded:

> We agree with the PUCO that our preemption analysis "is also to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted'." *Merrill Lynch v. Ware*, 414 U.S. 117, 127 (1973), *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) (citations omitted). However, we do not agree with the PUCO's interpretation of this language in this case. A failure to follow the preemption provision of the HMTA in no respect ousts the HMTA. In this case, the decision of the district court, applying the FRSA preemption provision to regulations promulgated under the HMTA, retains the essential character and purpose of both statutes. The national character of railroad regulation and the need for regulation of hazardous materials transportation on an intermodal basis are both respected.

CSX Transportation, Inc. v. Public Utilities Commission of Ohio, 901 F.2d at 502-03. These are the obvious and correct conclusions in the circumstances presented.

In passing the FRSA, Congress' overriding objective was to promote national uniformity in the regulation of all areas of rail safety. As the lower courts concluded, this fact is evidenced both by the legislative history of the 1970 Act and by the structure of the FRSA itself, and has been reaffirmed every time Congress has addressed the issue since 1970.

The lower courts rightly sought to protect these legislative objectives by preserving the statutory framework which was carefully designed to further them. For the lower courts to have done otherwise would have been contrary to Congress' unambiguously stated conclusion that it did "not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 1194, 91st Cong. 2d Sess.

At the same time, the lower courts' holdings leave wholly intact the central objectives of the HMTA. As the PUCO itself contends, the HMTA was designed to consolidate the power to promulgate regulations relating to the transportation of hazardous materials *in the Secretary of Transportation*. In so doing, national uniformity in regulation was also an objective of the HMTA. Congress intended nationally uniform regulations to control in this area in order to "preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1192, 93rd Cong., 2d Sess. 37 (1974). The lower courts' decisions do no damage to these objectives. There is nothing in the HMTA or its legislative history that

suggests that one of Congress' considered purposes in enacting the HMTA was to grant the states full authority to enforce regulations relating to the transportation of hazardous materials *by rail*. The HMTA's preemption provision, in sharp contrast to that of the FRSA, was the subject of essentially no congressional discussion. The breadth of the HMTA preemption provision is not the result of a plainly expressed congressional intent to unravel the careful statutory scheme it had created in the FRSA and, as the PUCO contends, to create a "dual" federal/state system of regulation and enforcement. Rather, the breadth of the HMTA provision is the result of the fact that the HMTA is applicable to so many different areas of commerce and that Congress fully anticipated that its effect would be tempered by any stricter, mode-specific preemption provisions already in place.

Where the decisions for which review is sought not only do not conflict with any other decision of this Court or with any decision of any other court, but actually are based upon and adhered to clear guidelines for analysis set down by this Court, there is simply no need for this Court to reconsider them.

CONCLUSION

Petitioner has failed to show any conflict between the decision of the Sixth Circuit Court of Appeals and prior decisions of this Court or of any other federal court. Petitioner has also failed to show any other basis for this Court to hear this case. The Sixth Circuit's decision is consistent with all relevant expressions of Congressional intent and with the guidelines for decisionmaking delineated by this Court. The Sixth Circuit's decision is and should remain unassailable. Accordingly, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

Samuel H. Porter
Counsel of Record

PORTER, WRIGHT,
MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215
(614) 227-2000
Attorneys for Respondents

Of Counsel:

PATRICK J. SMITH
ROBERT W. TRAFFORD
KATHLEEN McDONALD
O'MALLEY
JANET J. HENRY
PORTER, WRIGHT,
MORRIS & ARTHUR
41 South High Street
Columbus, Ohio 43215

A. GAYLE JORDAN
Norfolk & Western Railway
Co.
One Commercial Place
Norfolk, Virginia 23510

SALLY J. KIRCHER
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

JANET SCAGNELLI
Consolidated Rail
Corporation
1138 Six Penn Center
Philadelphia, Pennsylvania
19103

MARY P. SCLAWY
Grand Trunk Western
Railroad Co.
1333 Brewery Park
Detroit, Michigan 48207

CERTIFICATE OF SERVICE

I, Samuel H. Porter, a member of the Bar of this Court and counsel for respondents herein, hereby certify that on the 29th day of August, 1990, three copies of the Brief in Opposition to the Petition for Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit were served, postage prepaid, upon Anthony J. Celebrezze, Jr., Attorney General of Ohio, Robert S. Tongren, Assistant Attorney General, Counsel of Record, James B. Gainer, Assistant Attorney General, Counsel for Petitioner, at the Office of the Ohio Attorney General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43266-0573.

Samuel H. Porter
(Counsel of Record for Respondents)

No. 90-95

In The
Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

JAMES B. GAINER
Assistant Attorney General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43266-0573
(614) 466-4397

**Attorneys for Petitioners,
The Public Utilities Commission of
Ohio, *et al.***

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in concluding that a provision of the Federal Railroad Safety Act, 45 U.S.C. § 434, may be construed as the express intention of Congress to preempt Ohio statues and administrative regulations that are expressly preserved by the federal Hazardous Materials Transportation Act, 49 U.S.C.App. § 1811(a).

LIST OF PARTIES

The Public Utilities Commission of Ohio, and,
Jolynn Barry Butler, Chair
J. Michael Biddison, Commissioner
Ashley C. Brown, Commissioner
Richard M. Fanelly, Commissioner
Lenworth Smith, Commissioner,
in their respective capacities as Chair and Commissioners of the Public Utilities Commission of Ohio

CSX Transportation, Inc.
Consolidated Rail Corporation
Norfolk and Western Railway Company
Grand Trunk Western Railroad Company

AMICUS CURIAE
SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

The State of Washington
The State of Arizona
The State of California
The State of Louisiana
The State of Missouri
The State of Montana
The State of Nevada
The State of Texas
The National Association of Regulatory Utility Commissioners
The Railway Labor Executives' Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

On July 12, 1990, Petitioners, the Public Utilities Commission of Ohio, *et al.*, filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. On August 29, 1990, the Respondents, CSX Transportation, Inc., Consolidated Rail Corporation, Norfolk and Western Railway Company, and Grand Trunk Western Railroad Company (Railroads), filed a Brief in Opposition. Briefs amicus curiae in support of granting the writ were filed on August 30, 1990, by the States of Washington, Arizona, California, Louisiana, Missouri, Montana, Nevada, Tennessee, and Texas, the National Association of Regulatory Utility Commissioners, and the Railway Labor Executives' Association.

The Railroad's Brief in Opposition requests that this Court, through denying the writ, place its imprimatur upon the authority of the lower federal courts to overrule the express requirements of a federal statute. The precedent sought by the Railroads is that state safety regulations touching upon any area of railroad operation must be presumed to be subject to federal preemption. To the well-established preemption analysis stemming from the decisions of this Court, the Railroads would have the Court add an overarching principle: any ambiguity in congressional intent should be resolved in favor of preempting the right of state governments to govern. In short, the Railroads hope to make preemption the rule, rather than the exception.

All of the Railroads' arguments are bent on focusing the Court's attention on the broad preemption language of the FRSA (45 U.S.C. § 434), and away from the express requirements of the HMTA that the transportation of hazardous materials be regulated only on an intermodal basis under the HMTA (49 U.S.C. §§ 1801, 1802(2), (6)), and that consistent state laws be preserved (49 U.S.C. § 1811(a)). The Railroads would have the Court apply general "rules of statutory construction" to "interpret" away the express language of the HMTA, and to rewrite the preemption analysis mandated by the Court's previous decisions. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986); *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

If this Court's rules for determining federal preemption are to be preserved, certiorari must be granted in this case. Preemption may not be presumed. The decisions of this Court require that in reviewing preemption cases, courts must start with the *assumption*

that the historic police power of the states is not to be superseded by federal enactments "unless that was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, it is the most fundamental right of the states to protect the health and safety of state citizens that the Railroads have assailed. It is the protection of that fundamental state right that should compel the Court to review this important case.

REASONS FOR GRANTING THE WRIT

I. The decision of the lower court contravenes the express intention of Congress to preserve state laws that are consistent with the Hazardous Materials Transportation Act.

The linchpin of the Railroads' argument, and of the lower court's decision, is that Congress created a statutory conflict that must be resolved in favor of preemption. Thus, the lower court found that ". . . unlike the preemption provision of the FRSA, which forbids state regulation on subject matter on which the Secretary has already adopted a regulation, *the HMTA allows state regulations which are consistent with federal regulations.*" *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F. 2d 497, 501 (6th Cir. 1990) (emphasis added). Thus, the lower court recognized that the HMTA expressly preserves consistent state laws. *See* 49 U.S.C.App. § 1811(a).

There can be no doubt that the HMTA applies to the transportation of hazardous materials by rail. It expressly applies to all modes of transportation. *See* 49 U.S.C. App. § 1801; 49 U.S.C.App. § 1802(2), (6). The conflict was created by means of the lower court's finding that Congress also intended the FRSA to apply to the intermodal transportation of hazardous materials. *CSX*, 901 F. 2d at 500-501. Having found two conflicting federal statutes to both be applicable, the lower court simply overruled the express preservation of state authority in the HMTA, in favor of the broad preemption of the FRSA.

Neither the decision of the lower court, nor the statutory interpretation urged by the Railroads, follows the principles of

statutory construction that both claim to apply. In this regard, both *presume* a "clear and manifest" congressional intent to extend the reach of the FRSA beyond "all areas of railroad safety," as expressly defined by Congress, to encompass the intermodal transportation of hazardous materials. The "plain meaning" of the FRSA has been ignored.

Congress left no doubt about the scope of the FRSA. As enacted, and as it exists today, the scope of the FRSA was limited to "all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970." 45 U.S.C. § 431(a). The HMTA, enacted in 1974 to apply to all modes of transportation, is clearly not a "law relating to railroad safety" under the express terms of the FRSA.

The lower court ignored the scope of preemption under the FRSA, and found that the express preservation of consistent state regulation under the HMTA could be given effect only if Congress had expressly repealed the FRSA. *CSX*, 901 F. 2d at 502. The Railroads have extended this misapplication of the rules of statutory construction, noting that the "implied repeal of an earlier statute by mere enactment of a later, even potentially conflicting one, is disfavored and should be avoided whenever possible." Respondent's Brief in Opposition at 14, *citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984).

Clearly, the only statute that has been the subject of an "implied repeal" is the HMTA, by means of the lower court's "judicial repeal" of the express preservation of consistent state regulation, and the requirement that the transportation of hazardous materials be regulated on an intermodal basis. Certainly no repeal of the FRSA was necessary, because in enacting the HMTA Congress expressly removed from the FRSA any statutory authority to either regulate the intermodal transportation of hazardous materials, or to preempt state hazardous materials laws. *See* 49 U.S.C. § 1655(f)(3)(A) (1966) *amended by* 49 U.S.C. § 1655(f)(3)(A) (1975) (repealed 1983); Petition for a Writ of Certiorari at 18-27. The Secretary's statutory authority to regulate "railroad safety," which is required to be delegated to the Federal Railroad Administration (*see* 49 U.S.C. § 103(c)), was *expressly* amended to prohibit the regulation of the intermodal transportation of hazardous materials under the FRSA. Such authority was granted under, and limited to, the HMTA.

The lower court based its preemption decision upon the failure of Congress to "expressly repeal" that which had never been expressly enacted. Neither the HMTA, nor its predecessor, the Explosives and Other Dangerous Articles Act, had ever been expressly included as a "law relating to railroad safety" under the FRSA. In enacting the HMTA, Congress *expressly* removed the authority of the Secretary to regulate the transportation of hazardous materials under each of the modal safety statutes, including the FRSA. Congress *expressly* required intermodal regulation under the HMTA.

Similarly, both the Railroads and the lower court paid lip service to the principle of statutory construction holding that conflicting statutes should be reconciled if possible, so as to preserve the operation of each. *CSX*, 901 F. 2d at 502-503; Respondents' Brief in Opposition at 21-25. The effect of the lower court's decision, however, is to repeal the HMTA in favor of exclusive federal, and exclusively modal regulation under the FRSA. The lower court found federal preemption under the FRSA, a statute under which Congress expressly withdrew the Secretary's authority to regulate the transportation of hazardous materials. The statutory conflict created by the lower court was "reconciled" by the complete ouster of the HMTA, despite the clear expression of congressional intent evidenced by the HMTA.

There is no conflict between the goals of the respective statutes. One purpose of the FRSA is clearly to create a nationally uniform railroad system. The purpose of the HMTA is to regulate the transportation of hazardous materials on an intermodal basis, and to preserve consistent state laws. The only conflict in purpose was created by the lower court's erroneous conclusion that the FRSA applied to the intermodal transportation of hazardous materials. No conflict was created by Congress.

The HMTA preempts state laws that are inconsistent with the HMTA or regulations issued under the HMTA. 49 U.S.C.App. § 1811(a). "National uniformity," the goal of the FRSA, can hardly be impinged under the HMTA consistency requirement. State law must be consistent with federal law, or suffer preemption *under the HMTA*. The application of the FRSA, however, to consistent state laws regulating the intermodal transportation of hazardous materials, clearly defeats the purpose of the HMTA that hazardous materials transportation be regulated only on an intermodal basis under the HMTA. The lower court has effectively amended the

HMTA to apply to "all modes of transportation, *except rail*." Congress, however, inserted no such exception for railroads.

The familiar rules of statutory construction espoused by the Railroads serve only to obfuscate the error of the lower court's decision. An "interpretation," beyond the plain language of the statutes, is unnecessary. In enacting the HMTA, Congress expressly required that the transportation of hazardous materials, *by any mode*, be regulated under the HMTA. Consistent state laws were expressly preserved. The decision of the lower court serves only to create an exception to the HMTA for hazardous materials transported by rail. State laws that are clearly consistent with the HMTA are thereby preempted, and the manifest intent of Congress is defeated. Thus, a congressional intent to preempt was not only presumed, an express congressional intent to preserve consistent state regulation was vitiated. The lower court's faulty analysis, the potentially disastrous consequences for the safety of Ohio citizens, and the precedent destroying the states' most fundamental right to govern, can only be rectified by the review of this Court.

II. The decision of the lower court conflicts with applicable decisions of this Court.

The Railroads have requested that this Court ignore its own controlling decisions in *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986), and *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). Instead, the Railroads would have the Court deny certiorari on the strength of one erroneous district court decision that was not appealed, and the dicta of two district court decisions that played no part in the actual disposition of the cited cases.

The Railroad's first claim to a wealth of consistent treatment by the lower federal courts is *Atchison, Topeka & Santa Fe Ry. Co. v. Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977). The *Atchison* court found any analysis other than broad federal preemption to be "overly technical." *Atchison*, 453 F. Supp. at 924. Because *Atchison* was not appealed, the Seventh Circuit Court of Appeals has had no opportunity to address the question presented by the case at bar.

Other than the decision to be reviewed in this proceeding, *no federal court of appeals has ever addressed the question* of whether the

FRSA may be construed to preempt state laws that are expressly preserved by the HMTA. In *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987), another district court decision to which the Railroads would have this Court defer, the court opined in a footnote, without citation, that "an act by the Secretary pursuant to, for example, the HMTA could preempt state law under the terms of section 434 [of the FRSA]." *Missouri Pacific*, 671 F. Supp. at 471 n. 1. The court's speculation regarding the breadth of FRSA preemption was not germane to its decision, and the *Missouri Pacific* decision was affirmed on other grounds, without reference to the application of the FRSA to state intermodal hazardous materials requirements. The Fifth Circuit Court of Appeals found no need to address the lower court's unsubstantiated opinion that the HMTA is a "law relating to railroad safety," as defined by the FRSA. *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 850 F. 2d 264, 266 (5th Cir. 1988), *aff'g* 671 F. Supp. 466 (W.D. Texas 1987).

Finally, the Railroads have urged reliance upon *CSX Transportation, Inc. v. Tullahoma*, No. 4-87-47, slip op. (E.D. Tenn., Feb. 17, 1988), an unreported district court decision in which the issue germane to the case at bar was again addressed only in dictum, and not appealed. Thus, the string of "uniform" decisions that the Railroads would have this Court approve by denying the writ in this case consists of trial court dicta that has not even been reviewed by a federal court of appeals.

Yet, it is clear that a trend is developing. Without clarification of the appropriate standard of review in cases of federal preemption, the lower federal courts will undoubtedly continue to accept the easy answer that the broad preemption language of the FRSA may be construed to override the express intention of Congress that transportation be regulated only on an intermodal basis, and that consistent state laws be preserved. The denial of certiorari in this case can serve only to dilute, if not destroy, the preemption analysis mandated by this Court in *Louisiana* and *Pacific Gas*.

The message of the *Louisiana* and *Pacific Gas* decisions is straightforward: only Congress may displace state law. Where Congress has, by statute, preserved a measure of state authority in an area otherwise subject to broad preemption, the lower federal courts may not impose preemption over the expressed intention of Congress.

In both *Louisiana* and *Pacific Gas*, this Court weighed a federal statute requiring broad preemption, against a federal statute expressly preserving a sphere of authority within that broad preemption in which the states were free to regulate for the protection and benefit of state citizens. Contrary to the decisions of the lower court, in *Louisiana* and *Pacific Gas* this Court presumed that the police power of the states was not to be displaced unless Congress manifestly and *specifically* required preemption. In both cases the Court found that it was not the function of the judiciary to rewrite federal statutes in order to override a clear reservation of state authority.

The Railroads have attempted to distinguish *Louisiana* and *Pacific Gas* because in those cases the Court weighed competing sections within a larger federal statute, as opposed to the case at bar, where two federal statutes have been drawn into conflict. This "distinguishing factor" is patently illusory. The Railroads have cited no basis, in logic or precedent, that would contradict the rule that two statutes should be construed to avoid a conflict for the same reasons that separate sections within a larger statutory scheme should be so construed.

In *Louisiana*, this Court examined the Communications Act of 1934, and weighed 47 U.S.C. § 151 and § 220 (permitting broad preemption), against 47 U.S.C. § 152(b) (preserving state authority). *Louisiana*, 476 U.S. at 360-67. In *Pacific Gas*, this Court examined the Atomic Energy Act, and weighed 42 U.S.C. § 2021(c) (permitting broad preemption), against 42 U.S.C. § 2018 and § 2021(k) (preserving state authority). *Pacific Gas*, 461 U.S. at 208-11. In the case at bar, the State of Ohio has requested only that the Court apply the same analysis, weighing 45 U.S.C. § 434 (permitting broad preemption), against 49 U.S.C.App. § 1811(a) (expressly preserving state authority).

The decisions of this Court in *Louisiana* and *Pasific Gas* are clearly applicable to the case at bar. In enacting the HMTA, Congress required intermodal regulation and expressly preserved consistent state laws. As in *Louisiana* and *Pasific Gas*, the Court should again uphold the manifest intent of Congress permitting state governments to protect the health and safety of state citizens through reasonable and consistent regulations.

CONCLUSION

Federal preemption, implied and judicially imposed, is final. The hands of state government are tied, and the threat to be eliminated by state safety laws is allowed to persist. This Court has historically served as the final resort for state citizens against a central bureaucracy that would overwhelm the principles of federalism upon which the Constitution was founded. To preserve state sovereignty, this Court long ago created the rule of law that *pre-emption may not be presumed* unless that was the clear and manifest purpose of Congress. The lower courts have in the case at bar sought to erode that rule of law by presuming federal preemption in the face of statutes clearly preserving state authority. If the principle of federalism is still important, if federal statutes are to be limited to what they say, and if the manifest intent of Congress is to prevail, this Court must review and reverse the decision of the lower court.

For the foregoing reasons, Petitioners respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

JAMES B. GAINER
Assistant Attorney General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43266-0573
(614) 466-4397

Attorneys for Petitioners,
The Public Utilities Commission of Ohio, *et al.*

No. 90-95

In The

Supreme Court of the United States

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Sixth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

JAMES B. GAINER
Assistant Attorney General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43266-0573
(614) 466-4397

**Attorneys for Petitioners,
The Public Utilities Commission of
Ohio, *et al.***

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in concluding that a provision of the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 434, may be construed as the express intention of Congress to preempt Ohio statutes and administrative regulations that are expressly preserved by the federal Hazardous Materials Transportation Act (HMTA), 49 U.S.C. App. § 1811(a).

LIST OF PARTIES

The Public Utilities Commission of Ohio, and,
Jolynn Barry Butler, Chair
J. Michael Biddison, Commissioner
Ashley C. Brown, Commissioner
Richard M. Fanelly, Commissioner
Lenworth Smith, Commissioner,
in their respective capacities as Chair and Commissioners of the Public Utilities Commission of Ohio

CSX Transportation, Inc.
Consolidated Rail Corporation
Norfolk and Western Railway Company
Grand Trunk Western Railroad Company

AMICUS CURIAE
SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

The State of Washington
The State of Arizona
The State of California
The State of Louisiana
The State of Missouri
The State of Montana
The State of Nevada
The State of Texas
The National Association of Regulatory Utility Commissioners
The Railway Labor Executives' Association

AMICUS CURIAE
URGING DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

The United States of America, represented by the Solicitor General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

INTRODUCTION

On December 31, 1990, the Solicitor General filed an amicus curiae brief (hereinafter cited as S.G. Brief) in response to the court's order requesting the views of the United States. Petitioner, the Public Utilities Commission of Ohio, respectfully submits this supplemental brief in response.

DISCUSSION

The Solicitor General's brief misconstrues the law and attempts to trivialize the important state interest presented in this case. The premise of the Solicitor General's legal analysis is that an intention to preempt state law may be attributed to Congress despite the fact that Congress has enacted a statutory scheme preserving state law. However, the consistent decisions of this Court require an assumption that preemption of the states' police power is not to be presumed unless that was the clear and manifest purpose of Congress. In this case, preemption has been presumed over the manifest intent of Congress. The Solicitor General's brief proceeds along five erroneous assumptions.

1. First, the Solicitor General postulates that the 1970 inclusion of the Explosives and Other Dangerous Articles Act, 18 U.S.C. 831-835 (repealed 1979), in the appendix of a committee report listing laws supplementing the FRSA, indicates that Congress intended the FRSA to preempt state hazardous materials laws relating to rail. From this premise, the Solicitor General concludes that the FRSA still preempts state intermodal hazardous materials laws because the preemption provision of the FRSA has not been changed since 1970. S.G. Brief at 8-9.

This legal analysis simply denies the enactment of the HMTA in 1974. With the enactment of the HMTA, Congress specifically removed the Explosives Act from the list of laws supplementing the authority of the Secretary of Transportation under the FRSA:

> The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary *pertaining to railroad safety* as set forth in the statutes transferred to the Secretary by subsection (e) of this section (*other than [the Explosives and Other Dangerous Articles Act]*).

49 U.S.C. § 1655(f)(3)(A) (1974) (repealed 1983) (emphasis added). The Secretary has no authority under the FRSA beyond that delegated to the Federal Railroad Administration. 49 U.S.C. § 103(c) (1982 & Supp. V 1987).

By removing the Explosives Act from the scope of "railroad safety laws" under the FRSA, Congress manifested its intention that the modal safety statutes would no longer reach the intermodal transportation of hazardous materials. Under the HMTA, federal regulation of the transportation of hazardous materials was limited to the HMTA, and was required to be intermodal in nature. 49 U.S.C. App. § 1802(6).

The logical conclusion of the Solicitor General's argument is that the Secretary may preempt state hazardous materials laws pursuant to a statute, the FRSA, under which Congress denied the Secretary the *authority to regulate* the transportation of hazardous materials. This result creates a conflict between the FRSA and the HMTA, and renders the actions of Congress absurd.

2. In his next point, the Solicitor General recognizes that his argument has created a statutory conflict. That conflict is furthered by denying the express language of the HMTA. S.G. Brief at 13-14. Specifically, the Solicitor General concludes that the HMTA did not expressly preserve consistent state laws, but "simply left such consistent state requirements not preempted *by HMTA*." *Id.* at 13.

The HMTA expressly requires intermodal regulation (49 U.S.C. App. §§ 1801, 1802(2), 1802(6)), preempts inconsistent state laws (49 U.S.C. App. § 1811(a)), and establishes an administrative procedure to resolve federal and state jurisdictional disputes (49 U.S.C. App. § 1811(b)). This Court has specifically held that in creating such a dual system of federal and state regulation, an "affirmative grant of power to the states" is not necessary to avoid preemption. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 210 (1983). Rather, as the Court noted, by permitting state regulation Congress underscored the distinction between the spheres of activity left respectively to the federal government and the states. *Id.*

3. Having created a statutory conflict by concluding that Congress intended to apply inconsistent preemption provisions to the same state laws, the Solicitor General resolves that conflict by recommending that the HMTA be ignored. In this regard,

according to the Solicitor General, the preemption provisions of the FRSA and HMTA can be "reconciled" by creating an exception to the HMTA for railroads. S.G. Brief at 14. Thus, under the HMTA, consistent state intermodal hazardous materials requirements would apply to all modes of transportation other than by rail; under the FRSA, any state intermodal hazardous materials regulation affecting railroads would be preempted. *Id.*

The State of Ohio respectfully submits that such a construction can hardly be termed a "reconciliation" of the statutes. *See Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Contrary to the Solicitor General's claim, his construction serves to "completely oust" the express requirements of the HMTA that all federal regulation be intermodal (49 U.S.C. App. § 1802(6)), and that consistent state laws be preserved (49 U.S.C. App. § 1811).

The only possible "reconciliation" of the statutes is to recognize that Congress avoided such a conflict by removing the regulation of the intermodal transportation of hazardous materials from the scope of the modal safety statutes, including the FRSA. *See* 49 U.S.C. § 1655(f)(3)(A) (1974) (repealed 1983). In enacting the HMTA, Congress removed any authority to regulate the transportation of hazardous materials from each of the modal safety statutes, including the FRSA, and required intermodal regulation exclusively under the HMTA. There simply is no conflict if the actions of Congress are recognized, and the law as written is followed.

Further, even if the FRSA and the HMTA were considered to be in conflict, as the Solicitor General suggests, the most basic tenets of statutory interpretation would still require that the HMTA prevail. First, the Solicitor General has ignored the fundamental rule that "where provisions in . . . two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982) (citations omitted). Secondly, the Solicitor General has disregarded the rule that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (1980).

The HMTA, enacted in 1974, is unquestionably the later enacted statute, and is clearly more specific than the FRSA, enacted in 1970. The HMTA addresses, and is limited to, the specific area of

intermodal hazardous materials transportation. In contrast, the FRSA governs the entire spectrum of rail safety issues. Thus, even accepting the Solicitor General's conclusion that the statutes conflict, the manifest intent of Congress to preserve state laws under the HMTA must take precedence.

4. The Solicitor General concludes his legal analysis by asserting that this Court's previous preemption cases have no application to this case. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

With respect to *Louisiana*, the Solicitor General correctly notes that "the Court stressed the fact that the FCC's enabling statute contained a jurisdictional limitation intended to 'fence[ ] off' the FCC from regulating intrastate service, thereby preserving a state role." S.G. Brief at 15, *citing Louisiana*, 476 U.S. at 369-70. Applying *Louisiana* to the case at bar, the Solicitor General concludes that "[n]o comparable jurisdictional boundary, purporting to constrain federal authority, exists with respect to rail safety regulation; rather, once the Secretary has acted, his regulations preempt the field." S.G. Brief at 15.

In reaching this conclusion, the Solicitor General has once again ignored the enactment of the HMTA. Congress expressly "constrained federal authority" to regulate the transportation of hazardous materials by removing such authority from the scope of the Secretary's railroad safety powers under the FRSA. 49 U.S.C. § 1655(f)(3)(a) (1974) (repealed 1983). A "jurisdictional boundary" was created by the HMTA, under which regulation was required to be intermodal, and consistent state laws were preserved. 49 U.S.C. App. §§ 1802(6), 1811(a).

Similarly, the Solicitor General applies this Court's holding in *Pacific Gas* as if the HMTA did not exist:

> Significantly, no provision at issue in *Pacific Gas & Elec.* specifically ousted the States from playing their traditional regulatory role. In FRSA, however, Congress carefully addressed the role of the States with respect to rail safety, and determined that the need for a nationally uniform regulatory and enforcement system was paramount.

S.G. Brief at 15-16.

If the HMTA is considered, it is clear that Congress intended to preserve state authority to regulate the transportation of hazardous materials, so long as such regulation was consistent with the HMTA and federal regulations. 49 U.S.C. App. § 1811. In *Pacific Gas*, this Court found that "the Federal Government has occupied the entire field of nuclear safety concerns, *except* the limited powers expressly ceded to the States." *Pacific Gas*, 461 U.S. at 212. In the case at bar, the federal government has occupied the field of railroad safety, but Congress has, under the HMTA, specifically ceded limited power to the states to consistently regulate the intermodal transportation of hazardous materials. The Solicitor General's selective legal analysis cannot change that fact.

5. Finally, the Solicitor General has incorrectly suggested that the "practical significance" of this case has been "diminished" by recent amendments to the HMTA and FRSA. S.G. Brief at 16-18. The "recent amendments," enacted on November 16, 1990, allow the states to investigate and report violations of federal hazardous materials rules to federal authorities. Thus, Congress provided for limited state enforcement of hazardous materials rules in the same manner that federal rules promulgated under the FRSA have been enforced since 1970. *See* 45 U.S.C. § 435(a). In the opinion of the Solicitor General, this amendment "addresses in significant respects the concerns that prompted Ohio's action." S.G. Brief at 18.

The State of Ohio must respectfully disagree, and point out that the Solicitor General is not in a position to determine what will satisfy Ohio's concerns for the health and safety of its citizens. The State of Ohio certainly does not view the recent amendments as diminishing the practical significance of this case. To the contrary, reporting violations to the federal authorities, who have shown no inclination to even assess fines for reported violations, does not satisfy the states' concerns[1]. Ohio has a federal statutory right to consistently enforce the HMTA in its own program, utilizing its own funds, for the benefit of its own citizens. No lesser remedy will suffice.

---

1 If "practical considerations" are to be addressed, the Solicitor General has neglected to mention the abysmal record of the federal government in enforcing hazardous materials regulations pertaining to railroads. See GAO Report to the Chairman, Committee on Energy and Commerce, House of Representatives, Railroad Safety: DOT Should Better Manage its Hazardous Materials Inspection Program, GAO/RCED-90-43 (November, 1989).

In enacting the recent amendments, Congress did not redefine the intermodal transportation of hazardous materials as an "area of railroad safety" under the FRSA, as the Solicitor General implies (S.G. Brief at 17). Rather, Congress expressly noted that:

> Finally, while the bill does not authorize the States to enforce their own regulations, the bill does make it clear that *such legislation is not intended to affect the pending litigation on the question of whether a State has enforcement authority against the railroads for hazardous materials violations*. Thus, a reviewing court may conclude that the State is authorized to enforce State hazardous materials regulations against the railroads.

136 Cong. Rec. S17, 276 (daily ed. Oct. 26, 1990) (statement of Sen. Breaux) (emphasis added).

Thus, the clear intent of the 1990 amendments was to permit those states that have not enacted state hazardous materials laws to participate in limited enforcement of the federal regulations. Congress expressly avoided any impact on states, such as Ohio, where laws providing for consistent state enforcement programs were already in place. With respect to the alleged preemption of state hazardous materials laws enacted under the authority of the HMTA, Congress preserved the status quo, leaving it to this Court to uphold the manifest purpose of the HMTA.

In enacting the HMTA in 1974, the intent of Congress to bolster federal enforcement by preserving consistent state hazardous materials laws was clear. Congress was appalled at the lack of enforcement at the federal level:

> The Committee found that after three and one half years, the FRA inspection of rail equipment and plant seems to be a stepchild of the Department's low key safety approach. By April 1974, the FRA had only 12 track inspectors for over 300,000 miles of rail track, 16 signal and train control inspectors, and only 50 inspectors for more than 1.7 million freight cars and 25,000 locomotives. *There were only 8 inspectors for hazardous materials.*

H.R. Rep. No. 1083, 93d Cong., 2d Sess. 6-7 (1974) (emphasis added).

Congress recognized the urgent safety concern requiring the additional enforcement capability of the states:

> Since January 1, 1973, there have been 124 rail accidents in which hazardous materials carried aboard the train were involved. Casualties included 7 persons killed and 159 injured. In 30 of the accidents, evacuation was necessary for employees in terminal or plant areas, or for persons in communities adjacent to the accident site. In 29 of the accidents, contamination by potentially lethal chemicals occurred. Fires occurred in 34 accidents, and in 92 of the accidents, the hazardous materials were spilled out of their containers.

Id. at 15. Thus, the intent of Congress to not only preserve, but to encourage consistent state enforcement, was first expressed in 1974.

In 1980, Congress made it crystal clear that the HMTA was not to be considered a rail safety statute supplementing the FRSA. In describing the authority of both the Secretary and the states under the FRSA, the HMTA was expressly excluded as one of the railroad safety laws supplementing the FRSA. Specifically, Congress noted that "[s]ince the Hazardous Materials Transportation Act is not directed specifically and solely at railroad safety, that Act is not within the scope of the amendment." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 13 (1980).

Finally, in 1990, Congress again reviewed the federal enforcement program and found a distinct lack of progress. *See* GAO Report to the Chairman, Committee on Energy and Commerce, House of Representatives, *Railroad Safety: DOT Should Better Manage its Hazardous Materials Inspection Program*, GAO/RCED-90-43 (November, 1989). In order to further federal enforcement, Congress permitted and encouraged the states to participate in the federal program, primarily to conduct inspections. Congress left untouched those states, such as Ohio, where state legislatures had already made a commitment to consistently enforce the HMTA on the state level.

Thus, in 1974, 1980, and 1990, Congress has manifested a clear intention to preserve state intermodal hazardous materials laws. In the most recent amendments, Congress reviewed the case at bar, and placed its confidence in this Court to uphold the HMTA as it was enacted in 1974. The failure of the Court to accept this case will redefine the jurisprudence of preemption in the lower federal

courts, will effectively overturn the *Louisiana* and *Pacific Gas* decisions, and will deprive the citizens of Ohio of the protection of their health and safety that Congress has granted.

CONCLUSION

The brief of the Solicitor General has reaffirmed the proposition of law stemming from the case below: whenever an ambiguous legislative history permits preemption to be asserted, the states will shoulder the burden of proving that Congress *did not intend to preempt*. The decisions of this Court are to the contrary: courts must start with the assumption that the police power of the states is not to be superseded by federal enactments *unless that was the clear and manifest purpose of Congress*. The manifest purpose of Congress in the case at bar was to require intermodal regulation of the transportation of hazardous materials, including transportation by rail, and preserve consistent state laws. The challenged laws of the State of Ohio comport with that purpose, and should be upheld.

For the foregoing reasons, Petitioners respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

ROBERT S. TONGREN
Assistant Attorney General
Counsel of Record

JAMES B. GAINER
Assistant Attorney General

Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43266-0573
(614) 466-4397

Attorneys for Petitioners,
The Public Utilities Commission of Ohio, *et al.*

No. 90-95

In the Supreme Court of the United States

OCTOBER TERM, 1990

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
PETITIONERS

v.

CSX TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

LEONARD SCHAITMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-3441

QUESTION PRESENTED

Whether Ohio statutes and regulations governing the transportation of hazardous materials by rail are preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. 434, notwithstanding their purported compatibility with the preemption provision of the Hazardous Materials Transportation Act, 49 U.S.C. App. 1811 (1988).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulation—Continued: Page

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-95

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
PETITIONERS

v.

CSX TRANSPORTATION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. 421 *et seq.*, was enacted "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. 421. In order to ensure that regulations "relating to railroad safety * * * be nationally uniform to the extent practicable," FRSA includes a specific preemption provision, 45 U.S.C. 434, which provides in pertinent part:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

Once the Secretary has acted, additional or more stringent State regulation is permitted only where it is "necessary to eliminate or reduce an essentially local safety hazard," and is neither incompatible with Federal law nor unduly burdensome to interstate commerce. 45 U.S.C. 434. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

b. The Hazardous Materials Transportation Act (HMTA), 49 U.S.C. App. 1801 *et seq.*, was enacted in 1974 "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." 49 U.S.C. App. 1801. Dissatisfied with "the fragmentation of regulatory power among the agencies dealing with the different modes of transportation," S. Rep. No. 1192, 93d Cong., 2d Sess. 8 (1974), Congress consolidated the authority to regulate hazardous materials transportation in the Secretary of Transportation, and repealed the previously existing authority to regulate hazardous materials transportation that had been reposed in the Federal Railroad Administrator and the Federal Highway Administrator.[1] Acting on the authority of the HMTA, the Secretary has issued extensive regulations governing the transportation and packaging of hazardous materials in all modes of transportation, see 49 C.F.R. Pts. 171-180, as well as regulations specifically applying to rail transportation, see 49 C.F.R. 174.1-174.840. Pet. App. A5.

The HMTA also addressed the preemption of state law. The Act originally provided that "any requirement, of

---

[1] See 49 U.S.C. App. 1804(a) (1988); 49 U.S.C. 1655(f)(3)(A) and (B) (Supp. IV 1974); S. Rep. No. 1192, *supra*, at 38.

a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted"; inconsistent requirements would not be preempted, however, if, upon application of the State or political subdivision to the Secretary of Transportation, the Secretary determines that the state or local requirement affords equal or greater protection than HMTA and its implementing regulations, and is not an unreasonable burden on commerce. Pub. L. No. 93-633, § 112(a) and (b), 88 Stat. 2161, codified at 49 U.S.C. App. 1811(a) and (b) (1988).[2]

As a result, under FRSA a state requirement "relating to railroad safety" is preempted whenever the Secretary has issued regulations addressing the same "subject matter." 45 U.S.C. 434. Under HMTA as originally enacted, a state requirement that is consistent with federal law is not preempted under that statute's preemption provision. 49 U.S.C. App. 1811(a) (1988).

2. In 1988, Ohio enacted the Ohio Hazardous Materials Transportation Act (OHMTA). Pet. App. A1-A2. OHMTA authorizes the Public Utility Commission of Ohio (PUCO) to "adopt safety rules governing the transportation * * * of hazardous materials by railroad," and provides that such safety rules "shall be consistent with, and equivalent in scope, coverage, and content to, the provisions of the [HMTA], as amended, and regulations adopted under it." Ohio Rev. Code Ann. § 4907.64 (Anderson Supp. 1989). Acting on this authority, PUCO adopted, as requirements of Ohio law, the regulations promulgated by the Secretary of Transportation under HMTA in 49 C.F.R. Pts. 171-179. Ohio Admin. Code § 4901:3-1-10. PUCO is authorized to seek enforcement of these requirements through remedies including civil

[2] Congress recently amended the preemption provision of HMTA. See Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, §§ 4, 13, 136 Cong. Rec. S17,265, S17,269 (daily ed. Oct. 26, 1990), discussed at note 9, *infra*.

penalty actions. Ohio Rev. Code Ann. § 4905.83 (Anderson Supp. 1989).[3]

On September 27, 1988, respondents, four railroads that engage in rail transportation in Ohio and other States, filed a complaint against petitioners in the United States District Court for the Southern District of Ohio, challenging the validity of OHMTA and its implementing regulations. Respondents alleged that Ohio's requirements violate the preemption provisions of both FRSA and HMTA. Respondents also claimed that Ohio's requirements constitute an unconstitutional burden on interstate commerce. As relief, respondents sought a declaratory judgment and an injunction against the enforcement of the Ohio statute and PUCO's administrative regulations. Pet. App. A2, A19.

On cross-motions for summary judgment, the district court held that the Ohio requirements are preempted by FRSA, 45 U.S.C. 434, and permanently enjoined their enforcement. Pet. App. A16-A17. The court explained that the Ohio regulations constitute laws and regulations "relating to railroad safety," and apply in an area of rail safety in which the Secretary of Transportation has issued federal regulations. *Id.* at A5-A9. Relying on FRSA's plain language, statutory structure, and legislative history, the court concluded that 45 U.S.C. 434 preempts Ohio's regulation of the transportation of hazardous materials by rail. Pet. App. A7-A9.

3. The court of appeals affirmed. After extensively reviewing the statutory schemes enacted by FRSA and HMTA, the court concluded that the Ohio requirements are covered by FRSA's preemption provision. Pet. App. A24. The court rejected petitioners' contention that the preemptive effect of FRSA is qualified by HMTA, explaining that "the purpose of the HMTA was

---

[3] Ohio also enacted legislation authorizing PUCO to adopt safety rules, that are consistent with federal requirements under HMTA, governing the highway transportation of hazardous materials. See Ohio Rev. Code Ann. § 4919.85 (Anderson Supp. 1989).

to consolidate regulation of hazardous material transportation at the Secretarial level, and not to remove such regulation of hazardous material transportation by rail from the preemption provision of the FRSA." *Id.* at A23.

The court also dismissed petitioners' reliance on *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986), and *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). In those cases, the court noted, the statutory schemes in question were found not to preempt state action because the statutes had expressly reserved a sphere of action to the States. Pet. App. A25-A26. In contrast, FRSA does not contain an explicit reservation of authority to the States; rather, "[t]he federal government clearly has the power to regulate all aspects of railroad safety." *Id.* at A26.

Finally, the court of appeals agreed with the district court that applying the FRSA preemption provision to regulations promulgated by the Secretary under HMTA is consistent with the purposes of both statutory schemes. "The national character of railroad regulation and the need for regulation of hazardous material transportation on an intermodal basis are both respected." Pet. App. A26.

DISCUSSION

In addressing an issue of first impression in the courts of appeals, the Sixth Circuit correctly held that Ohio's safety regulations governing the transportation of hazardous materials by rail are preempted by FRSA. The preemptive command of FRSA is clear and unequivocal: unless adopted to meet local safety hazards, state requirements "relating to railroad safety" are preempted if the Secretary has issued regulations on the same "subject matter." 45 U.S.C. 434. That is precisely the case here with respect to Ohio's adoption, as state requirements, of the Secretary of Transportation's regulations relating to railroad transportation of hazardous materials. Although the Secretary's regulations were issued under the

authority of HMTA, not FRSA, nothing in the language, structure, or background of either statutory scheme prevents such regulations from serving as the basis for preemption under FRSA's broad preemption provision.

The court of appeals' analysis is also consistent with this Court's exposition of the principles relevant to preemption analysis in other statutory contexts. Moreover, recent congressional amendments to the HMTA and the FRSA, although not directly addressing the question presented here, have provided a mechanism for States to participate in the administration of federal requirements governing the transportation of hazardous materials by rail, thereby reducing the practical significance of this case. In light of those considerations, the petition for a writ of certiorari should be denied.

1. The preemption of state law by a federal statute turns on the intent of Congress. *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990). Congress may express its intention to occupy the field through an explicit provision that "its enactments alone are to regulate a part of commerce"; in that case, a "state law[] regulating that aspect of commerce must fall." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

FRSA expressly preempts a state requirement "relating to railroad safety" when the Secretary of Transportation has issued regulations "covering the subject matter of such State requirement." 45 U.S.C. 434. Under a natural reading of that provision, Ohio's requirements are preempted. The text of Ohio's statute attests to its purpose of regulating railroad safety in the transportation of hazardous materials; the statute states that PUCO may "adopt safety rules governing the transportation * * * of hazardous materials by railroad." Ohio Rev. Code Ann. § 4907.64 (Anderson Supp. 1989). Moreover, the Secretary of Transportation plainly has regulations covering the "subject matter" of Ohio's requirements; Ohio has assimilated into its own body of law

federal regulations that the Secretary has promulgated under HMTA.[4]

To resist the force of FRSA's language, petitioners contend that the Secretary's regulations under HMTA are not regulations "relating to railroad safety"; therefore, petitioners argue, such regulations cannot be used as the basis for preempting Ohio's requirements. Pet. 15-27. Instead, petitioners believe that Ohio's regulations should be measured exclusively by the standards of HMTA's more permissive preemption provision. The background and structure of FRSA and HMTA refute those contentions.

a. FRSA was designed to implement a comprehensive and nationally uniform regulatory system for railroad safety. Congress provided that once the Secretary of Transportation has issued regulations in a particular area of rail safety, state regulation on the same subject matter is preempted. 45 U.S.C. 434. States are not permitted "to establish Statewide standards superimposed on national standards covering the same subject matter." H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

This all-encompassing preemption provision resulted from intensive debate on the proper role of the States in rail safety matters. See Pet. App. A8-A9. In rejecting the possibility that States might "adopt all Federal standards and, * * * enforce them at the State level," the House Committee Report explained that "safety in the Nation's railroads would [not] be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems," and that "such a vital part of our interstate commerce as railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government." H.R. Rep. No. 1194, *supra*, at 11, 19. Instead, States were authorized to par-

---

[4] The local-safety-hazards exception, 45 U.S.C. 434, is not available to Ohio's requirements, which are explicitly applicable statewide. See H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

ticipate in assuring rail safety by assisting the Secretary of Transportation in investigating the railroad industry's compliance with federal requirements. 45 U.S.C. 435. See H.R. Rep. No. 1194, *supra*, at 19-20.

Congress clearly envisioned that regulations pertaining to the safe transportation of hazardous materials by rail would be subject to FRSA's preemption provision. When enacting FRSA, Congress was acutely aware that a major rail-safety issue was the transportation of hazardous materials. Referring to testimony at committee hearings, the House Report described several railroad catastrophes as providing "graphic evidence * * * of the potential for destruction which these hazardous materials accidents have for the public and railroad employees." See H.R. Rep. No. 1194, *supra*, at 9. In recognition of that potential, the declaration of congressional purpose in FRSA states that the reduction of mortality, injury, and property damage "caused by accidents involving any carrier of hazardous materials" is a central goal of the Act. 45 U.S.C. 421.

The legislative history confirms that Congress considered the Secretary's existing power to regulate the transportation of hazardous materials to be part of his arsenal of authority for protecting railroad safety. The House Committee Report, in an appendix collecting prior laws that had addressed specific rail safety needs, listed the Explosives and Other Dangerous Articles Act (Explosives Act), 18 U.S.C. 831-835 (repealed), which, at the time, provided the Secretary with certain authority to regulate the transportation of dangerous materials.[5]

---

[5] The Explosives Act originated in 1909 legislation, see S. Rep. No. 1192, *supra*, at 6, and, as amended, vested authority in the Interstate Commerce Commission to regulate the transportation of explosives and other articles. Act of June 25, 1948, ch. 645, 62 Stat. 738-740, repealed, Pipeline Safety Act of 1979, Pub. L. No. 96-129, § 216(b), 93 Stat. 1015. When Congress created the Department of Transportation in 1966, it transferred the preexisting regulatory authority under the Explosives Act to the Secretary of Transportation. 49 U.S.C. 1655(e)(4) (1970). By statute,

H.R. Rep. No. 1194, *supra*, at 7, 61-65. Moreover, when Congress considered the legislation that became the HMTA in 1974, the Explosives Act was recognized to be one of HMTA's precursors. See S. Rep. No. 1192, 93d Cong., 2d Sess. 6 (1974).

Against that background, it is clear that Congress did not intend to limit the preemptive scope of FRSA to regulations enacted under powers given to the Secretary in FRSA alone; rather, it contemplated that *all* of the Secretary's regulations relating to rail safety, including those specifically dealing with hazardous materials, would give rise to nationally uniform standards. Although Congress has since substantially revised the regulatory scheme governing the transportation of hazardous materials, it has never amended the preemption provision of FRSA or evinced an intent to depart from the policy of uniform regulation of rail safety matters underlying that provision.

b. Contrary to petitioner's contention (Pet. 14-18), the requirement introduced in 1974 by HMTA—that the Secretary, rather than individual agency components within the Department, shall regulate the transportation of hazardous materials—does not affect the scope of FRSA preemption. HMTA was intended to resolve problems flowing from the dispersion of authority among several agencies to regulate the transportation of hazardous materials. S. Rep. No. 1192, *supra*, at 8. HMTA therefore provided the Secretary of Transportation with new authority to regulate the transportation of hazardous materials, see 49 U.S.C. App. 1804 (1988), and gave the Secretary "a broad mandate so that comprehensive regulations can be issued as the need arises covering whatever facet of * * * transportation requires regulation." S. Rep. No. 1192, *supra*, at 32. At the same time, Con-

---

the modal administrations within the Department were given the authority to promulgate regulations under the Explosives Act. 49 U.S.C. 1655(f)(3)(A) and (B) (Supp. IV 1974). See Pet. App. A20-A21.

gress amended the Department of Transportation Act to "exempt from the regulatory authority of the Federal Railroad Administrator and the Federal Highway Administrator the safety responsibility as to the transportation of hazardous materials by railroad carrier and motor carrier." *Id.* at 38. The amendment was designed to "consolidate in the Secretary of Transportation the authority needed to regulate the transportation of hazardous materials." *Ibid.*; see Transportation Safety Act of 1974, Pub. L. No. 93-633, § 113(e), 88 Stat. 2163.

The effect of HMTA was thus to confer upon the Secretary, rather than the Federal Railroad Administrator, the authority to issue regulations dealing with the transportation of hazardous materials by railroad. But, as the court of appeals recognized, that change in regulatory authority did not alter the fact that the Secretary's regulations continue to have preemptive force under FRSA. Pet. App. A24. Nor does the redistribution of power within the Department of Transportation impair the character of hazardous materials regulations relating to railroads as rail safety regulations for purposes of FRSA. See *Atchison, T. & S.F. Ry.* v. *Illinois Commerce Comm'n*, 453 F. Supp. 920, 924 (N.D. Ill. 1977); *Missouri Pac. R.R.* v. *Railroad Comm'n*, 671 F. Supp. 466, 482 (W.D. Tex. 1987), aff'd, 850 F.2d 264 (5th Cir. 1988) (per curiam).

The structure of the statute further dispels any inference that FRSA's preemption provision is intended to apply only to regulations the Secretary has promulgated under FRSA's authority. Congress expressly limited the scope of certain other provisions of FRSA to regulations issued under that statute; the absence of a comparable restriction in the preemption provision is telling.[6] See

---

[6] See, *e.g.*, 45 U.S.C. 435(a) (1988) (allowing State participation in investigative and surveillance activities in connection with regulations "prescribed by the Secretary under this subchapter"); 45 U.S.C. 437(a) ("The Secretary is further authorized to issue orders directing compliance with this chapter or with any railroad

General Motors Corp. v. *United States*, 110 S. Ct. 2528, 2532 (1990); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The limitations that petitioners would place on FRSA's preemption provision are also inconsistent with FRSA's guiding purpose. When Congress enacted FRSA, it recognized that the Secretary had diverse sources of statutory authority, enacted over many years, with which to address rail safety issues, and it determined not to alter those sources of authority. Accordingly, in order to achieve a nationally uniform regime for rail safety, preemption had to apply to regulations issued, not only under the new authority provided by FRSA, but also under the Secretary's preexisting statutory authority; otherwise, the desired uniformity could not be attained. Under petitioners' approach, however, States could wield independent enforcement authority over certain rail safety issues not regulated specifically by FRSA—precisely the situation that Congress was determined to avoid. See H.R. Rep. No. 1194, *supra*, at 11-12.

Although Congress enacted a preemption framework in HMTA that is tolerant of consistent state regulation, that statute does not provide that the preemptive effect of the Secretary's regulations under HMTA would be governed solely by its—and not by FRSA's—preemption provision. See 49 U.S.C. App. 1811(a) (1988). And the legislative history affords no hint that Congress intended to make inroads in the strong policy of national uniformity in railroad safety regulation so recently expressed in FRSA.[7]

---

safety rule, regulation, order, or standard issued under this subchapter."); 45 U.S.C. 437(c) ("All orders, rules, regulations, standards, and requirements in force, or prescribed or issued by the Secretary under this subchapter * * * shall have the same force and effect as a statute for purposes of the application of sections 53 and 54 of this title * * *.").

[7] The preemption provisions of the HMTA derived from the Senate bill. See H.R. Conf. Rep. No. 1589, 93d Cong., 2d Sess. 25

Petitioners nevertheless contend (Pet. 18-27) that FRSA preemption applies only to "laws * * * relating to railroad safety," and that Congress has expressly defined that phrase to exclude the HMTA. As an initial matter, we note that the phrase "relating railroad safety" as used in 45 U.S.C. 434 describes the type of *State* requirements that are preempted, not the type of *federal* requirements that accomplish the preemption. Here, there can be no doubt that Ohio's requirements relate to railroad safety; that is the precise function ascribed to them on the face of Ohio's statute.

In any event, petitioners are incorrect in claiming that Congress has defined the phrase "relating to railroad safety" to exclude the HMTA for purposes of FRSA's preemption provision. When FRSA was enacted, Congress plainly considered the Explosives Act, one of HMTA's precursors, to be a law related to railroad safety; the same characterization applies to HMTA itself. See pp. 8-9, *supra*. Petitioners engage in a misguided effort (Pet. 18-27) to weave a variety of provisions dealing with some aspect of railroad safety (particularly those enacted in the Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811), into a general definition of law "relating to railroad

---

(1974). The Senate Report "endorse[d] the principle of Federal preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation"; a limited exception from this principle was permitted for state legislation, approved by the Secretary, that is essentially designed to deal with "exceptional circumstances" requiring "immediate action to secure more stringent regulations." S. Rep. No. 1192, *supra*, at 37-38. Neither the Senate nor the House Committee Reports discussed the interaction between the HMTA and the FRSA preemption provisions, see *ibid.*; H.R. Rep. No. 1083, 93d Cong., 2d Sess. (1974), nor did the floor debate on the bill reported by the Conference Committee touch on that issue. See 120 Cong. Rec. 40,677-40,680 (1974); 120 Cong. Rec. 41,409-41,410 (1974).

safety." [8] The answer to that argument, however, is that Congress has never provided a definition of that phrase that applies to 45 U.S.C. 434, and petitioners' invention of such a definition is hardly compelled by a need, for example, to lend coherence to operation of the FRSA. On the contrary, a preemption provision covering all laws relating to railroad safety, construed broadly, is perfectly compatible with more specific definitions of railroad safety laws for other purposes.

c. The conclusion that FRSA preempts Ohio law in this case does not conflict with HMTA. Pet. 27-29. HMTA, as originally enacted, did not affirmatively preserve the validity of state requirements that are consistent with federal requirements relating to hazardous materials transportation. Rather, HMTA's preemption provision simply left such consistent state requirements not preempted *by HMTA*. 49 U.S.C. App. 1811 (1988).[9]

---

[8] For example, petitioners note (Pet. 20-21) that in expanding the opportunity for States to participate in the railroad safety inspection program created by FRSA, Congress did not authorize state participation in safety programs carried out under the authority of HMTA because that statute was thought not to relate exclusively to rail safety issues. See § 4(a), 94 Stat. 1812, adding 45 U.S.C. 435(g). But there is no inconsistency in both excluding hazardous materials regulations from the state-participation program, and preempting independent State requirements relating to hazardous material transportation by rail. (See also p. 17, *infra*, with respect to Congress's recent amendment to 45 U.S.C. 435 to expand the state-participation program.) Equally unavailing is petitioners' reliance (Pet. 24) on a specific definition of the term "Federal railroad safety laws" to include FRSA, HMTA, and other laws for purposes of a provision affording protection to whistle blowers complaining of violations of railroad safety laws. 45 U.S.C. 441(e). That Congress provided a specific definition in that context in 1980 does not signify an intention to modify the scope of FRSA's preemption provision, which was enacted a decade earlier. See H.R. Rep. No. 1025, 96th Cong., 2d Sess. 19 (1980).

[9] The same is true of HMTA's amended preemption provisions enacted in the Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, §§ 4, 13, 136 Cong. Rec. S17,265, S17,269 (daily ed. Oct. 26, 1990). The amended Section 105 of

The provision simply does not speak to the effect that other laws might have on state requirements. Cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 329 n.22 (1981) ("There is nothing unusual about Congress enacting a particular provision, and taking care that this enactment by itself not disturb other remedies, without considering whether the rest of the Act does so or what other remedies may be available.").

Nor is HMTA's preemption provision nullified by complementing it with FRSA's. Under HMTA, state regulation of hazardous-materials transportation by other modes than railroad can take place, if consistent with federal requirements.[10] Construing both FRSA and HMTA to apply to state requirements applicable to railroads thus serves the goal of reconciling "the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). In contrast, petitioners' construction of the statutes would work a partial implied repeal of the FRSA preemption provision. Petitioners have not made the difficult showing

---

HMTA, to be codified at 49 U.S.C. App. 1804, provides a specific list of subject matters (not including the transportation of hazardous materials by rail), on which the States, political subdivisions, or Indian Tribes may maintain regulations that are substantively the same as federal regulations. 136 Cong. Rec. S17,265 (daily ed. Oct. 26, 1990). The amended Section 112(a) of HMTA, to be codified at 49 U.S.C. App. 1811(a), provides for preemption of a requirement of a State, political subdivision, or Indian Tribe where (1) compliance with such a requirement and federal requirements is not possible; (2) compliance with a requirement obstructs the implementation of federal hazardous materials regulations; or (3) preemption is accomplished under Section 105(a)(4) or 105(b). The Secretary and the courts may determine whether a requirement is preempted; the Secretary, under criteria similar to existing law, may also determine to waive preemption, subject to judicial review. 136 Cong. Rec. S17,269 (daily ed. Oct. 26, 1990).

[10] Indeed, Ohio has taken advantage of that provision with respect to highway transportation. See note 3, *supra*.

necessary to justify that disfavored result. Cf. *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1974); *Traynor* v. *Turnage*, 485 U.S. 535, 547-548 (1988).

2. We do not agree with petitioners' submission (Pet. 7-14) that the court of appeals' holding conflicts with this Court's decisions in *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986), or *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

In *Louisiana Public Service Comm'n*, the Court considered "a system of dual state and federal regulation over telephone service," 476 U.S. at 360, in which the FCC enjoyed exclusive authority over interstate telephone service, while the States retained jurisdiction over intrastate service. The Court concluded that a federally prescribed method for depreciation of telephone plant did not preempt inconsistent state regulation of depreciation methods. In so holding, the Court stressed the fact that the FCC's enabling statute contained a jurisdictional limitation intended to "fence[] off" the FCC from regulating intrastate service, thereby preserving a state role. *Id.* at 369-370. No comparable jurisdictional boundary, purporting to constrain federal authority, exists with respect to rail safety regulation; rather, once the Secretary has acted, his regulations preempt the field.

In *Pacific Gas & Elec.*, the Court held that California's requirements addressing the economic problems of long-term disposal of nuclear waste from nuclear reactors were not preempted by the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. 2011 *et seq.* The Court relied on the fact that the purpose of the Atomic Energy Act is to regulate safety issues in nuclear power, 461 U.S. at 212, without displacing the traditional authority exercised by the States over the economic considerations in utility regulation. *Id.* at 205-212. Significantly, no provision at issue in *Pacific Gas & Elec.* specifically ousted the States from playing their traditional regulatory role. In FRSA, however, Congress

carefully addressed the role of the States with respect to rail safety, and determined that the need for a nationally uniform regulatory and enforcement system was paramount.

3. Finally, the practical significance of the Sixth Circuit's holding has been diminished by recent congressional action in amending the FRSA and the HMTA. On November 16, 1990, the President signed into law the Hazardous Materials Transportation Uniform Safety Act of 1990 (Safety Act), Pub. L. No. 101-615, 136 Cong. Rec. S17,264-S17,274 (daily ed. Oct. 26, 1990). The Safety Act represents the first major amendment of the HMTA since its enactment and emerged from "a long and comprehensive multiyear reevaluation" of that statute's operation. 136 Cong. Rec. S17,274 (remarks of Sen. Exon).

The House Energy and Commerce Committee reported a bill that would have expressly rejected the interpretation of the FRSA reached by the district court in this case. See H.R. Rep. No. 444, 101st Cong., 2d Sess. Pt. 1, at 53-54 (1990).[11] The House proposal, however, was not enacted. As a supporter of the House proposal explained, "an amendment permitting State enforcement * * * would doom any hazardous materials transportation legislation this Congress." 136 Cong. Rec. S17,276 (daily ed. Oct. 26, 1990) (remarks of Sen. Breaux).

Although the Safety Act was not intended to affect the merits of the legal issue involved in this case,[12] Con-

---

[11] The report on a competing bill produced by the House Public Works and Transportation Committee did not directly discuss this issue. See H.R. Rep. No. 444, 101st Cong., 2d Sess. Pt. 2 (1990).

[12] Section 30 of the Safety Act states: "Nothing in this Act, including the amendments made by this Act, shall be construed to alter, amend, modify, or otherwise affect the scope of section 205 of the Federal Railroad Safety Act of 1970 [45 U.S.C. 434]." 136 Cong. Rec. S17,274 (daily ed. Oct. 26, 1990). Legislators in both chambers indicated their understanding that the Safety Act would not affect the legal issues in the pending litigation over the scope of FRSA preemption. See 136 Cong. Rec. H13,648 (daily ed.

gress's express authorization of state participation in the rail safety inspection program with respect to hazardous materials transportation has considerably lessened the practical significance of the court of appeals' holding. Section 28 of the Safety Act, 136 Cong. Rec. S17,274 (daily ed. Oct. 26, 1990), amends Section 206(a) of FRSA, 45 U.S.C. 435(a), to "expand the State participation program * * * to encompass hazardous materials regulations promulgated by DOT pursuant to HMTA," such that States may participate with respect to "all areas of railroad safety." S. Rep. No. 449, 101st Cong., 2d Sess. 30 (1990).[13] The provision leaves intact the Secretary's "exclusive authority to assess penalties and to request injunctive relief," but enables a State to apply to a district court for assessment and collection of a civil penalty if federal officials do not act within 60 days after receiving notification of a violation from a participating State agency. The amendment thus "close[s] a loophole in current law which limits the participation program to general rail safety violations but does not include [hazardous materials] violations." *Ibid.* See also 136 Cong. Rec. S16,867 (daily ed. Oct. 23, 1990) (remarks of Sen. Exon) (explaining the provision's genesis as the resolution of a conflict between some States, which argued for authority to enforce hazardous materials requirements, and the railroad industry, which had argued for full federal preemption).

The amendments made by the Safety Act thus provide a vehicle for States to participate in the administration of the federal hazardous-materials regulations with respect to railroads. Ohio's present legislation sought to achieve a similar result by incorporating federal requirements

---

Oct. 25, 1990) (remarks of Rep. Whittaker and Rep. Luken); *id.* at S17,276 (daily ed. Oct. 26, 1990) (remarks of Sen. Breaux).

[13] The FRSA participation program authorizes States to "participate in carrying out investigative and surveillance activities" with respect to rail safety issues under conditions prescribed in the statute. 45 U.S.C. 435(a).

into state law. Although Ohio's legislative approach to bringing its resources to bear on the problem differs from the approach adopted by the Safety Act, that Act addresses in significant respects the concerns that prompted Ohio's action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

LEONARD SCHAITMAN
Attorney

DECEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20275

No. 90-95

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al* .,
Petitioners,

v.

CSX TRANSPORTATION, INC., *et al* .,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

Lawrence M. Mann *
Christopher B. Little
400 North Capitol Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191
Attorneys for *Amicus Curiae*
Railway Labor Executives'
Association

* Counsel of Record

August 30, 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF AMICUS CURIAE OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 37.2.[1]

INTEREST OF THE AMICUS CURIAE

The Railway Labor Executives' Association ("RLEA") is an unincorporated association whose membership is comprised of almost all of the nation's rail unions, representing over 300,000 railroad employees. The health and safety of a large percentage of these would be aided by the State of Ohio's rules. RLEA represents its membership in numerous forums including collective bargaining and Federal and state legislation and regulations. As it relates to the pending litigation, RLEA participated in all the Federal legislative efforts including the relevant Federal Railroad Safety Act, 45 U.S.C. §§ 421 *et seq.*, ("FRSA"), the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801 *et seq.*, ("HMTA") the Federal regulations adopted thereunder and the proceedings in the State of Ohio.

The Federal railroad enforcement program is seriously lacking due to mismanagement, philosophical ideals and budget constraints. Thus, when Federal inspections fail, rail labor is the last and only check on the system. As such rail labor is in a unique position to witness and report the impact of

---

[1] Counsel have obtained the consent of petitioners and respondents to filing of this brief. Their letters to that effect have been lodged with the Clerk.

the regulatory effort in the transportation of hazardous materials by rail. Rail labor is threatened each and every day with serious injury or death when working in and around hazardous materials.

In terms of legal argument, *amicus* does not seek here to embellish the petition filed on behalf of the State of Ohio. Instead, this brief outlines the parody of a regulatory system that fails its essential purpose.

SUMMARY OF ARGUMENT

The decision by the Sixth Circuit in *CSX Transportation, Inc. v. Public Utilities Commission of Ohio*, 901 F.2d 497 (6th Cir. 1990), creates a vacuum wherein all railroads that transport hazardous materials and toxic substances can effectively avoid compliance with any and all regulation.[2/] Under the Sixth Circuit's ruling, the State of Ohio must suffer the hazard of being victim to unsafe hazardous materials transportation within its state, and the indignation of not being able to address the problem.

The history of the incestuous alliance with the Federal Railroad Administration ("FRA") and the railroads it is charged with regulating is revealing.[3/] Rail labor, the National

---

[2/] The nation's railroads transport approximately 3,000 car loads of hazardous materials daily totalling about 4 billion tons annually.

[3/] The Secretary of Transportation ("Secretary") delegated his responsibilities under the FRSA to the FRA. *See* 49 C.F.R. 1.49(m) where the FRA is delegated authority to "carry out the functions vested in the Secretary by the Federal Railroad Safety Act of 1970." The FRA's

Transportation Safety Board ("NTSB"), the General Accounting Office ("GAO"), the Office of Technology Assessment ("OTA"), and Congress have long questioned FRA's devotion to safety and its meek enforcement tactics. Nevertheless, if the decision of the Sixth Circuit is not reviewed, the railroads will be given *carte blanche* to dictate safety by their balance sheets.

The *amicus* will now bring to the Court's attention a theme of misplaced Federal enforcement that delegates public safety to entrepreneurial discretion. Railroad safety in general, and particularly the transportation of hazardous materials, has been neglected by a remiss Federal agency that disregards the appeal for oversight that would greatly enhance rail safety.

Amicus recognizes the concern to keep interstate commerce moving without undue state intervention. Yet, Federal preemption of state health and safety laws must not be lightly viewed.[4/] A state must not be foreclosed from practicing that which protects its own citizens from unsafe railroad operations. The states have a vested and substantial goal in establishing an effective program designed to ease the burden on the Federal system, while simultaneously creating safe hazardous materials transportation.

---

affair with the railroads has continually been criticized. Recently that program has been reproached. *See infra* at 5-14.

4/ The regulation of health and safety has long been considered as "primarily, and historically" a matter of local concern. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S.Ct. 2371, 2376 (1985).

ARGUMENT

I THE MIAMISBURG ACCIDENT

On July 8, 1986, fifteen rail cars on a Baltimore and Ohio Railroad Company derailed in Miamisburg, Ohio. Three of the cars were tank cars which contained yellow phosphorus, molten sulfur, and tallow. The tank car containing molten sulfur ruptured, and during the following 48 hours, a 3-square mile area was evacuated. Initially, 7,000 residents were evacuated; however, eventually an estimated 30,000 people were forced to leave their homes and businesses. A total of 569 persons were treated for various complaints during the incident. Property damage totalled $3.5 million.

On September 29, 1987, the NTSB issued its report on the B&O accident at Miamisburg, Ohio. *See* NTSB/HZM-87/01 (September 29, 1987). In its conclusion, the NTSB stated that the FRA has not established direction nor control over the implementation of the authority it delegated to the Association of American Railroads ("AAR") to assure that public safety concerns are appropriately balanced against industry economic interests for tank car safety. The NTSB said that the absence of effective FRA action has resulted in an industry self-regulated system which does not provide adequate public safety accountability on decisions made affecting tank car designs, construction, and modification. *See Id.* at 45-47.

More specifically, the NTSB was highly critical of FRA's enforcement procedures. The NTSB concluded:

17. The FRA has not established sufficient direction or controls over the AAR's implementation of the authority it delegated for tank car safety to assure that public safety concerns are appropriately balanced against industry economic interests.

18. The absence of effective FRA action for determining the adequacy of the AAR's implementation of the delegated responsibilities has resulted in an industry self-regulated system which does not provide adequate public safety accountability on decisions made affecting tank car designs, construction, and modification.

Id. at 46-47.

These findings exasperate those who worked so hard to pass the FRSA and the HMTA. The railroads have turned both laws into irritations, not safety tools.

II THE FRA IS NOT POLICING THE FRSA AND HMTA AND THE STATE OF OHIO PAYS THE PRICE

A. The Dilemma With Tank Cars

Tank cars are the primary means by which railroads transport hazardous materials. The FRA has abdicated its responsibility here and entrusted the railroads with that authority. The compendium is telling and several independent Federal agencies have been critical of the policy.

After disasters at Waverly, Tennessee, in 1978 and Paxton, Texas on September 8, 1979 the NTSB held unprecedented *en banc* hearings on the carriage of hazardous materials by rail. Foremost, the NTSB found:

The evidence indicated that tank cars can and should be made safer. The jumbo tank cars were designed and

> certified by an interlocking group of business interests who manufacture, buy, sell, and use tank cars. Witnesses from the Federal Railroad Administration (FRA), shippers, and tank car companies testified that the design of the jumbo tank cars did not represent a level of safety commensurate with their 200-percent increase in product capacity.

NTSB-R-78-28-31 (1978).

The facts of the Paxton accident gave rise to the NTSB *SPECIAL INVESTIGATION REPORT, The Accident Performance of Tank Car Safeguards*, NTSB-HZM-80-1 (March 8, 1980) where the NTSB made a number of urgent recommendations. *See Id.* at 20-21. FRA took almost four years to implement some of the recommendations. *See* 49 Fed. Reg. 3468 (January 27, 1984), and took no further action until strong Congressional persuasion forced FRA to recognize its obligation. FRA is only now initiating a rulemaking partially addressing the subject. *See* 55 Fed. Reg. 20242 (May 15, 1990).

Notwithstanding opposition to its lax attitude, FRA still delegates to the railroads unbridled power. One of the most revealing statements then, and applicable now, states, "[p]ast history indicates that the industry determines DOT's action in tank car specifications and modifications." *See* NTSB-SEE-78-2, 5 (June 23, 1978). Today, the AAR still inspects the manufacturers' facilities to determine compliance with its standards. This inspection system receives guidance from the AAR Committee on Tank Cars which is composed of thirteen members, seven from the railroads and six from

various trade organizations.5/ The AAR has more power in the transportation of hazardous materials then does the State of Ohio, or any other state. This is not the intent of Congress.

The FRA conduct here is merely a glimpse at one of the many underlying problems with hazardous materials transportation by rail. The true dilemma faced by the State of Ohio and all other states is not how to regulate, rather, how to legally enforce Federal regulations. Congress and three independent Federal agencies all desire that end. *Amicus* respectfully suggests that the duty of the State of Ohio to protect its citizens from conduct suggested, outweighs the desertion of Federal duty.

B. The FRA Is Not Doing Its Job

FRA has long been the focus of criticism for its poor job of administering railroad safety. Initially, FRA refused to adopt regulations within one year from date of enactment as required by the statute. Not until late 1973 did FRA finally promulgate its first rule. *See* H.R. Rep. No. 93-1083, 93 Cong. 2d Sess. 9 (1974). Congressional criticism was harsh:

> The weight of evidence gathered in testimony before the Subcommittee indicated the Federal Railroad Administration simply was not living up to neither the spirit of the Federal Railroad Safety Act of 1970, nor, in some cases, the letter of the law.

5/ These organizations include, The American Petroleum Institute, The Chlorine Institute, The Compressed Gas Association, Chemical Manufacturing Association, National LP-Gas Association, and the Railway Progress Institute.

Id. at 6.

In 1975 Congressional dissatisfaction with FRA became further evident. *See* H.R. Rep. No. 94-240, 94th Cong., 1st Sess. 5 (1975). FRA's lack of concern for safety led Congress in 1976 to enact several amendments which were designed to put some teeth into FRA's enforcement activities. Moreover, the Committee found "that FRA should move expeditiously to encourage more States to participate in the enforcement of Federal rail safety regulations." H.R. Rep. No. 94-1166, 94th Cong., 2nd Sess. 8 (1976).

In 1978 the Administrator of the FRA, testifying before both the House and Senate admitted that the railroad safety program had worsened instead of diminished since the passage of the FRSA. *See Hearings Before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 10,556*, 95th Cong., 2d. Sess. 87-89 (March 15 and 16, 1978). The problem with FRA caused nine members of the House Committee on Interstate and Foreign Commerce to file *Separate Views on FRA's Lack of Attention to Railroad Safety*, H.R. Rep. No. 95-1176, 95th Cong., 2d Sess. pp. 16-20 (1978). The members identified what they considered to be the greatest single problem in rail safety today: "[T]he failure and apparent refusal of the Federal Railroad Administration (FRA) to enforce the Federal rail safety statutes in the aggressive manner as intended by Congress." *Id.* at 16. The nine members called for definitive action by Congress in three areas. First, Congress should seek ways to force FRA to initiate an aggressive program of enforcing Federal safety

statutes and regulations. Second, an appropriation should not be limited to sums that the FRA seeks. Third, in view of FRA's failures, the various states should be given greater authority over rail safety.6/ *Id.* at 20. Congressional intent can not be stronger.

In 1978, the myriad of problems with FRA caused Congress to request that the OTA evaluate the Federal railroad safety program. In general the study concluded that FRA had failed to set safety goals and had been unable to implement its enforcement authority effectively. In particular, data collection was found to be piece-meal and inadequate; inspections did not correlate with demonstrated needs for a decrease in accidents; regulations did not appropriately set forth performance standards; and penalties were not being assessed in a rational manner. Finally, the state participation program was not being administered effectively. *See* Sen. Rep. No. 96-785, 96th Cong. 2d Sess. 3 (1980).

In 1986, OTA again revisited the FRA and remarkably concluded that the identical problems still existed.

> Rulemakings are initiated either by petition from industry of an interested party, or are forced on DOT by widespread public concern, often focused through NTSB or Congress. This kind of reactive rulemaking does not measure up to today's needs.

6/ Today, there are 31 states employing 109 inspectors participating in safety inspections. The FRA currently employs 361 inspectors, of which only approximately 10% are hazardous materials inspectors.

See Transportation of Hazardous Materials, Office of Technology Assessment, 8 (July 1986). *See also Hazardous Materials Transportation: Hearings Before The Subcommittee On Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 22 (1987).

In 1988, the GAO conducted a study that showed in Pennsylvania alone, the FRA levied only one fine, $2,500.00, in twenty one accidents despite glaring violations of federal regulations by the railroad industry. *See Railroad Safety: Accidents in Pennsylvania and Related Federal Enforcement Action*, GAO/RCED-89-52 (November 1988). The *amicus* notes here that this steady practice by the FRA has placed the public in the precarious position of waiting for a Pandoras tank car to open, spill or explode and devastate any community because of the inadequate rail safety standards and poor Federal enforcement.

The GAO issued another report on its investigation of railroads underreporting injuries and accidents, which merits attention here. The Report, entitled *Railroad Safety - FRA Needs To Correct Deficiencies In Reporting Injuries And Accidents*, GAO/RCED-89-109 (April 1989), reviewed data for calendar year 1987 on five railroads and determined that the injury and accident data base is unreliable because of serious underreporting. The GAO selected the CSX, Union Pacific, Amtrak, Chicago & North Western and the Chicago Central & Pacific railroads.[4] The GAO uncovered

---

[4] In summary the GAO found:

> substantial underreporting and inaccurate reporting of injury and accident data by the railroads it visited, which raises questions about the overall effectiveness of FRA's safety program and the extent to which railroads have become safer.

Id. at 3.

This year, the GAO again found fault with FRA's inspection program. In its Report, *Railroad Safety More-FRA Oversight Needed to Ensure Rail Safety in Region 2*,

---

> --Lost work days associated with employee injuries, which is an FRA measure of injury severity, were underestimated by about 269 percent at the four railroads whose records were audited. CSX underestimated lost work days by over 270 percent.

See Id. at 16.

> --FRA data reflected only 57 percent of the actual number of severe injuries, defined by FRA as 10 or more lost work days, at three of the railroads surveyed.

See Id. at 17.

> --Amtrak, CSX and UP did not report 61 of 521 or 12% of the injuries that met FRA's reporting criteria.

See Id. at 17.

> --The CSX, UP & Amtrak collectively underreported railroad accidents by 10%. CSX underreported accidents by almost 43%.

See Id. at 19.

> --The railroads underreported by 52% the amount of property damage sustained in 171 accidents. CSX understated damages by 69%.

See Id. at 21.

GAO/RCED-90-140 (April 1990).8/ The GAO determined that "Region 2 has no written goals regarding how often hazardous materials shipper and railroad facilities should be inspected." *Id.*. at 5. The GAO concluded that

> [t]he lack of written inspection goals and complete and up-to date inspection point lists, and possibly inadequate inspector resources hamper the effectiveness of the FRA Region 2 hazardous materials inspection program.

Id. at 13. GAO also found

> FRA Region 2 has not established inspection frequency goals and does not maintain complete, up-to-date lists of the inspection points (hazardous materials shippers and railroads) that is should be inspecting. Also, because hazardous materials shippers are not required to register, FRA may never identify and inspect some of these shippers. Seventy percent of the region's inspection points were not inspected in 1987 and 1988. (Footnote omitted) In our view, Region 2 may not have enough inspectors to effectively carry out its inspection program.

Id. at 3.

8/ As of March 1990, Region 2 had six hazardous materials inspector positions to cover six states--Delaware, Maryland, Ohio, Pennsylvania, Virginia, and West Virginia--and the District of Columbia. The hazardous materials inspectors identify and inspect shippers, railroads, and rail cars involved in transporting hazardous materials that travel over about 22,000 railroad route miles in the region.

Id. at 3.

Finally, FRA statistics, substantiate the position of the State of Ohio.

FRA ENFORCEMENT OF HAZARDOUS MATERIALS[9]

	1987	1988	1989
Inspections	8,335	7,880	8,069
Tank Cars Inspected	73,283	65,513	77,765
Defects Recorded	17,050	17,948	16,904
Violation Reports	399	622	815
Claims Settled	262	187	474
Settlement Amount	$565,800	$393,455	$789,960
Cost/defect recorded	$33.18	$21.92	$46.73

With absolutely no deterrent effect from FRA enforcement, it is not surprising to find that hazardous materials accidents are on the rise.[10]

9/ Source: Office of Chief Counsel, Federal Railroad Administration.

10/ In the AAR's, *Annual Report On Hazardous Materials Transported By Rail, Year 1989*, the following statistics are found:

Number of Train Accidents	1987	1988	1989
Involving Hazardous Material Car	351	475	517
In Which Hazardous Material Car Was Damaged or Derailed	186	237	251
Involving a Release of Hazardous Materials	40	44	55
Resulting in an Evacuation	28	32	28

In the Senate Appropriation Committee report on the Department of Transportation's FY 90 budget it is pointed out that the Committee is concerned "that the total sum of civil penalty forfeiture collected during fiscal year 1988, is sending an inappropriate message to industry and to railroad employees and the hazardous materials community. Meaningful levels of penalties are needed to reduce noncompliance." S. Rep. No. 101-121, 101st Cong., 1st Sess. 89 (1989).

C. Recent Accidents Mandate State Involvement

As previously mentioned, the NTSB is also concerned with the DOT's failure to act and enforce regulations. *See* NTSB/RAR-89/04 (July 6, 1989), where the NTSB report is underscored by NTSB Member Jim Burnett's dissent which found

> Our investigation establishes that . . . (FRA) failed to do its job, which in turn led to this accident.

Id. at 73.

The result of such malfeasance by FRA is calamitous, which no state should be forced to endure. The following accidents all involve hazardous materials, tank cars, FRA inaction, and were severe enough to merit thorough NTSB investigation. These examples are not all inclusive, but are simply representative of the extent of the problem.

On April 3, 1983, in the Denver and Rio Grande Western Railroad Company train yard in Denver, Colorado a tank car was punctured and Nitric acid was released. Nitric Acid is extremely toxic and only because the spill occurred on a Sunday was the evacuation limited to only 9,000 people. The car involved was made of aluminum and was not equipped with headshields or thermal protection which, in the NTSB's

opinion, would have prevented the accident. *See* NTSB/RAR-85/10 (May 14, 1985).

On February 5, 1984, 38 cars on a Seaboard System Railroad derailed near Clay, Kentucky. One of the derailed cars contained oleum (fuming sulfuric acid) which reacts violently when introduced to the atmosphere. The accident occured in rural Kentucky so an evacuated area of six square miles only effected 25 families. Once again, the NTSB found an ill equipped tank car was the primary cause. *See* NTSB/SIR-85/01 (April 30 1985).

On December 31, 1984 at the Missouri Pacific Railroad Company's North Little Rock, Arkansas Rail Yard, ethylene oxide leaked from a tank car. Ethylene oxide is a clear, colorless, volatile liquid used for making rocket propellants, and is extremely toxic. Over 2,500 persons were evacuated and rail and highway traffic near the area was stopped. The NTSB found that the main cause was a faulty tank car. The investigation disclosed the fact that since 1971 the manufacturer of the involved tank car had been installing anti-shift brackets improperly. The NTSB concluded that the switchman who discovered the leak was placed in grave peril because he was not familiar with and trained in hazardous material spills response. Further, the NTSB found that FRA does not adequately monitor manufacturers for compliance with DOT standards and proper construction methods. *See* NTSB/SIR-85/03, 20 (September 4, 1985).

On February 4, 1985 anhydrous hydrofluoric acid (hydrogen fluoride) released from a tank car at Conrail's receiving yard in Elkhart, Indiana. Hydrogen fluoride is a

colorless fuming liquid used as a catalyst for various chemical reactions, as well as refining uranium, and as a component of some liquid rocket propellants. It is toxic and corrosive. The main cause was determined to be a Burlington Northern decision to continue transporting the hazardous substance eventhough the tank car was reported leaking the day before. Unsupervised decisions such as this cause an unnecessary risk of life and property to railroad employees and surrounding communities. *See* NTSB/HZM-85/03 (November 27, 1985).

On September 9, 1987, butadiene, a colorless, flammable gas used primarily in the manufacture of synthetic rubber, and also used in developing rocket fuels, plastics, and resins, vaporized and ignited after it leaked from the bottom manway of a tank car located at the CSX Terminal in New Orleans. The resulting flames rose one hundred feet and engulfed both bridge spans of Interstate 10. The car erupted at two in the morning, so very little traffic was on a usually busy interstate. During the next 48 hours over 200 hundred city blocks were evacuated. The tank car burned for two days and damage was estimated at $500,000. *See* NTSB/HZM-88/01, 59-61 (September 30, 1988).

On February 26, 1989, in Akron, Ohio, 2,000 homes were evacuated, 17,500 passengers of the Metro Bus System were stranded, 39,000 students, teachers, employees and employers had the day off because two tank cars containing butane erupted after 21 of 49 cars derailed near a chemical plant. Adding to the potential worries of all involved was the fact that a nearby tire manufacturing plant had large quantities of acrylonitrile and ammonia gas, as well as, butadiene, the

same chemical that exploded in New Orleans, on September 8, 1987. The NTSB has yet to issue its investigation but it is just one more rail accident that may have been prevented if the FRA did its job.

Recently, a number of other accidents, all of which could have been prevented demonstrate the need for state enforcement. In Freeland, Michigan on July 22, 1989, CSX joined an Atchison Topeka-Santa Fe flat car with a history of derailments to a unit train containing hazardous materials. Predictably, the flat car derailed and three tank cars carrying hazardous materials were breached and exploded. During the NTSB investigation of the accident, it was disclosed that CSX had terminated all carmen in the region, thereby causing trains to be inadequately inspected before leaving a terminal. The NTSB has not issued its final report.

On February 2, 1989, a caboose less train with an electronic end-of-train telemetry device ("EOT") struck three manned locomotives in Helena, Montana. Shortly thereafter, a punctured tank car containing isopropyl alcohol began leaking and another tank car containing hydrogen peroxide exploded. This caused at least 15 personal injuries, an evacuation of at least 3500 people and massive amounts of property damage. A cause of the accident was a faulty air brake system that had excessive leakage both from the brake pipe and the brake cylinders due to shrinkage of rubber gaskets brought on by extreme cold. The loss of brake pressure coupled with the failure of the EOT and the already inoperative individual car brake systems rendered the braking system useless in the gradient territory. Simply put, a railroad crew was required to

operate a train with defective brakes and without an adequate train brake inspection.

Finally, on July 6, 1989, the NTSB chastised the FRA for the inadequate enforcement programs. In NTSB/RAR-89/04, *supra*, the Board documented numerous instances of FRA oversight and neglect that contributed to the head-on collision near Altoona, Iowa, on July 30, 1988. The accident killed two operating personnel, released hazardous materials and caused estimated damages above $1,000,000.00. The Board concluded (1) that the FRA failed to follow up on the status of the signal system, (2) the FRA failed to oversee railroad operations and failed to take enforcement action for noncompliance with Federal regulations and (3) the FRA did not have a system to follow up on reported defects on the railroad. *Id.* at pp. 66-69.

III STATE ENFORCEMENT IS APPROPRIATE

The fact that railroads will continue to transport hazardous materials is uncontroverted. However, states must not be forced to stand aside and watch disasters happen. Moreover, due to recent developments and Federal recognition of budget constraints, it is apparent that states must play a more active role in interstate commerce.

In *Moving America, New Directions, New Opportunities*, Department of Transportation (February 1990), the Bush Administration advocates a Federal-State partnership. The National Transportation Policy urges the state and local governments to provide the major share of public sector transportation financing. *See Id.* at 42.

> To have the transportation system we need for the future, we must recognize new and different roles for Federal, State, and local governments and incorporate that realignment within government transportation programs.

Id. at 43.

The involvement of the states is extremely important in helping to improve hazardous materials transportation. The states have a vested substantial interest in establishing effective railroad safety enforcement programs. If FRA's attitude in dealing with safety was not so deficient, significant assistance could be obtained from states to help assure that the railroads comply with the laws and regulations. From rail labor's perspective this is centered in FRA's lack of commitment to assure a safe railroad system, and the agency's lack of sufficient personnel to accomplish the task. The lack of enforcement is rampant and, if not changed soon, the railroad industry will face the similar catastrophes to those occurring under the present OSHA program. *See, Criminal Penalties For OSHA Violations, Hearings Before The Committee On Governmental Operations*, 100th Cong., 2nd Sess. (February 4, 1988).

The entire purpose of the FRSA was to abolish the railroad industry's "free market regulation." "The bulk of existing railroad safety practices was developed over the years by the industry itself." The state of the then existing safety record was abundantly clear: "The most obvious trend in any recent examination of railroad safety is the large and steady increase in the number of train accidents." *Report Of The Task Force On Railroad Safety*, Submitted to the Secretary of

Transportation, June 30, 1969.11/ Yesterday the railroads failed in their attempt to self-regulate. Today, the inadequacy of the FRA enforcement provisions, coupled with the increase in accidents and incidents, and the fact that railroads are now becoming the chief transporter of hazardous materials beckons more state involvement.

Here, if the State of Ohio is foreclosed, then safety will be relegated to balance sheets. Only by a rigorous state participation in the Federal program can the public be adequately protected.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully Submitted

Lawrence M. Mann *
Christopher B. Little
400 North Capitol Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191
Attorneys for *Amicus Curiae*
Railway Labor Executives' Association

* Counsel of Record

August 30, 1990

11/ *See also Federal Railroad Safety Act of 1969: Hearings on S. 1933, S. 2915, and S. 3061 Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce*, 91st Cong., 1st Sess. pp. 373-378 (1969).

No. 90-95

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., et al.,

Respondents.

Brief of Amici Curiae States of Arizona, California, Louisiana, Missouri, Montana, Nevada, Tennessee, Texas, and Washington, and the National Association of Regulatory Utility Commissioners in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Appendix

KENNETH O. EIKENBERRY
Attorney General
ROBERT E. SIMPSON
Assistant Attorney General
Counsel of Record
DONALD T. TROTTER
Assistant Attorney General
Attorneys for Amicus Curiae
State of Washington

Heritage Plaza Building
1400 S. Evergreen Park Drive S.W.
Olympia, Washington 98504
(206) 586-1146

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in preempting rail hazardous materials regulations of the State of Ohio, when Congress expressed its desire for active state involvement in all modes of hazardous materials enforcement, including rail; when the federal government actively encouraged such involvement; and when the states, pursuant thereto, have enforced rail hazardous materials requirements for many years?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

No. 90-95

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

THE PUBLIC UTILITIES COMMISSION OF OHIO, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC., *et al.*,

Respondents.

Brief of Amici Curiae States of Arizona, California, Louisiana, Missouri, Montana, Nevada, Tennessee, Texas, and Washington, and the National Association of Regulatory Utility Commissioners in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Appendix

The *amici curiae* states and the *amicus* National Association of Regulatory Utility Commissioners (hereafter "NARUC") pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit issued on April 13, 1990.

STATEMENT OF INTEREST OF AMICI CURIAE

A. Nature of Amici Curiae

The states of Arizona, California, Louisiana, Missouri, Montana, Nevada, Tennessee, Texas, and Washington each regulate common carrier railroads operating within each respective state. In each state, regulatory authority

has been delegated by statute to a regulatory agency. Pursuant to such delegation, each of the *amici curiae* states has adopted and actively enforces rail hazardous materials regulations. (The exceptions are Arizona and California, which are in the process of adopting rail hazardous materials regulations). The appendix to this brief identifies the rules (or statutes when appropriate) for each of the *amici curiae* states.

The NARUC is a quasi-governmental nonprofit organization. Founded in 1889, NARUC membership includes the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public utility regulation in America. More specifically, the NARUC membership contains the state officials charged with the duty of regulating the safety and services of rail carriers within their respective jurisdictions. These officials have the obligation under state law to assure the maintenance of safe and effective rail carrier service as may be required by the public convenience and necessity, and to ensure that intrastate service is provided at rates and conditions which are just, reasonable and nondiscriminatory for all shippers.

The NARUC's responsibilities are nationwide and involve a broad spectrum of regulatory problems and responsibilities unique to it as an organization. As characterized by Congress, the NARUC is "the national organization of the State Commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. *See*, e.g., 49 U.S.C. § 11506 (c)(1). Moreover, Federal courts have recognized that NARUC is a proper party to represent the collective interest of the state regulatory commissions. *See, e.g., United States v. Southern Motor Carriers Rate Conference*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd*, 672 F.2d 469 (5th Cir. 1982), *aff'd en banc*, 702 F.2d 532 (5th Cir. 1983), *rev'd*, 471 U.S. 48 (1985). *See also Indianapolis Power & Light Co. v. ICC*, 687 F.2d 1098 (7th

Cir. 1982); and *Washington Utilities and Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975).

B. Interest in the Proceedings

The lower court decision invalidated Ohio's railroad hazardous materials regulations on the basis of Federal preemption. Consistent application of this ruling could place in jeopardy rail hazardous materials enforcement programs of the *amici curiae* states, and the regulatory programs of regulatory agencies in other NARUC member states.

C. Importance of the Issue Presented

If the lower court decision is applied in all jurisdictions, a substantial void will have been judicially created in the area of rail hazardous materials enforcement. As discussed in more detail later, for many years and with the support of the federal government, the states have enforced rail hazardous materials regulations that are consistent with federal regulations.

This case is also important because the need for meaningful local regulation cannot seriously be disputed, as hazardous materials transportation poses a serious and mounting public safety threat. For example, in 1974 Congress estimated that 2 billion tons of hazardous materials were being transported annually (all modes), in as many as 250,000 movements a day. S. Rep. No. 1192, 93d Cong., 2d Sess. 7 (1974). Unintentional releases of such materials during transportation had increased 37 percent between fiscal 1972 and fiscal 1973. (1973 - 6,014 incidents; 1972 - 4,400 incidents) *Id.*

In just six years, the amount of hazardous materials transported has increased 100 percent. By 1990, 4 billion tons of hazardous materials were being transported annually, with as many as 500,000 movements a day. H.R. Rep. No. 444, 101st Cong., 2d Sess. 18 (1990).

Unfortunately, in the face of these sobering statistics, the performance of the federal rail hazardous materials program can only be described as deplorable. In 1974, prior to passage of the HMTA, Congress discovered that there

were only *12* Federal Railroad Administration (FRA) track inspectors for 300 million miles of track; 50 FRA inspectors for 1.7 million freight cars and 25,000 locomotives; and FRA freight car inspections had actually *decreased* between 1972 and 1973. S. Rep. No. 1192, 93d Cong., 2d Sess. 14 (1974).

Federal hazardous materials enforcement efforts continue to frustrate Congressional expectations. A report by the General Accounting Office (GAO), RAILROAD SAFETY, DOT SHOULD BETTER MANAGE ITS HAZARDOUS MATERIALS INSPECTION PROGRAM, GAO/RCED-90-43 (November 1989), paints a picture at the federal level of understaffing, lack of review of carrier safety procedures by federal inspectors, maintenance of an inadequate data base, and, in general, a poorly managed rail hazardous materials safety program. Indeed, the Chairman of the House Committee on Energy and Commerce, in summarizing the report found that federal "mismanagement, inefficiency, and a lack of staff resources have deprived the public of adequate protection against the threat of major hazardous materials accidents." H.R. Rep. No. 444, 101st Cong., 2d Sess. 22 (1990).

It is also important to recognize that when rail hazardous materials accidents occur, the results can be catastrophic. A 1974 explosion of a tank car carrying a hazardous material resulted in 2 deaths, 60 injuries, and economic losses of $5 million to $10 million. S. Rep. No. 1192, 93d Cong., 2d Sess. 9 (1974).

It is therefore understandable that the *amici curiae* parties are concerned about preserving their historic role in enforcing rail hazardous materials regulations. For the State of Ohio, that role was wrongfully terminated by the lower court decision.

SUMMARY OF ARGUMENT

Hazardous materials regulation is a matter of national concern. But that national concern must be implemented and enforced at the local level, since it will almost

always be state and local officials that respond to a hazardous materials incident, and who best understand local conditions.

The lower court ignored express statements of Congress that the preemption standard in the HMTA would apply to *all modes* of transportation. The court ignored the substantial federal involvement in the promotion and nurturing of state hazardous materials enforcement programs for all modes of transportation. Moreover, the court misapplied preemption analysis by failing to reconcile the FRSA and the HMTA when such a reconciliation was clearly available, and which would have avoided preemption of the state in an area of strong local interest: public safety and welfare. Finally, the court erroneously and/or improperly applied an implied repeal analysis. The effect of these errors, either singly or collectively, was to create a regulatory void contrary to any rational understanding of Congressional intent.

Congress intended the states to have a role in rail hazardous materials enforcement. The effect of the lower court decision is to deprive Ohio of that role. The Court should grant the petition for a writ of certiorari in order to address the important public safety issues presented in this case.

ARGUMENT

This case involves a determination whether the preemption provision in the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. § 1801 *et seq.*, or the preemption provision in the Federal Railroad Safety Act (FRSA), 45 U.S.C. § 421 et seq. applies to state rail hazardous materials regulations. If the HMTA preemption standard (49 U.S.C. § 1811) is applied, Ohio's regulations consistent with federal regulations are not preempted. If the FRSA preemption standard (45 U.S.C. § 434) is applied, state/federal consistency is irrelevant; Ohio's regulations on the same subject are preempted.

As we discuss below, the lower court erred by failing to apply the HMTA preemption standard to state rail hazardous materials regulations.

A. THE LOWER COURT ERRED BY IGNORING CONGRESS' SPECIFIC INTENT THAT THE HMTA PREEMPTION STANDARD APPLY TO ALL MODES OF TRANSPORTATION

While the lower court correctly observed that the preemption provision of the FRSA was not specifically discussed during the passage of the HMTA, *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497, 501 (6th Cir. 1990), it erred in concluding that this meant the FRSA preemption standard applied. Indeed, in its analysis, the court failed to acknowledge the following key facts:

1. In the process of enacting the HMTA, Congress recognized that the preemption provision in Section 1811 of the HMTA "applied to *all modes* of transportation." H.R. Rep. No 1589, 93d Cong., 2d Sess. 25 (1974) (emphasis added). This led to the only exception in Section 1811, which applies to common carrier natural gas pipelines. 49 U.S.C. § 1811(c). Common carrier railroads were *not* excepted.

2. Congress took care to specifically state that transportation subject to regulation under the HMTA meant transportation "by any mode." 49 U.S.C. § 1802(6).

Recognition of these clear statements of legislative intent would not have led the lower court to conclude, as it did, that the removing of hazardous materials regulation from the FRA, and placing it with the DOT, was simply to "consolidate regulation of hazardous material transportation at the Secretarial level* * *" 901 F.2d at 501. On the contrary, the enactment of the HMTA was intended to result in a special regulatory scheme, applicable to all modes of hazardous materials transportation, and accompanied by a special preemption standard. The lower court erred in reaching a conclusion inconsistent with this clear intent of Congress.

B. THE LOWER COURT ERRED BY IGNORING THE SUBSTANTIAL FEDERAL INVOLVEMENT IN STATE RAIL HAZARDOUS MATERIALS ENFORCEMENT

The lower court's opinion is devoid of *any* analysis of the substantial federal involvement in the development of state rail hazardous materials regulations. Such an analysis would have clearly demonstrated repeated and consistent governmental intent that the states have a role in rail hazardous materials regulation.

While not apparent from the lower court's decision, this is not a case in which the federal government has sat by in silence while states have adopted rail hazardous materials regulations. For example, in 1987 the Department of Transportation issued an "Inconsistency Ruling" analyzing rail hazardous materials regulations of the State of Nevada for consistency with federal requirements. Obviously, if these state regulations were preempted, an inconsistency ruling would have been a meaningless exercise. While the DOT found the particular state regulations at issue inconsistent with federal regulations, it emphatically stated that DOT "encourages states to adopt and enforce the [federal hazardous materials regulations] as state regulations." Inconsistency Ruling No. IR-19, *Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials*, 52 Fed. Reg. 24404, 24410 (June 23, 1987) [citation omitted].

This "encouragement" took various other forms. For example, under the State Hazardous Materials Enforcement Development Program (SHMED), the federal government provided funding to the states to encourage adoption of federal rail hazardous materials regulations and development of state enforcement programs.The SHMED program had two goals: 1) decreasing the number of hazardous materials transportation accidents by strengthening State enforcement capabilities, and 2) promoting uniformity in State hazardous materials safety

regulations and enforcement procedures. U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *TRANSPORTATION OF HAZARDOUS MATERIALS*, OTA-SET-304, at 173 (1986). While emphasis was placed on highway transportation, the report recognized that "***State enforcement activities [were] very important for all modes* * *." *Id.* at 217.

In another report, the federal government recognized its role to "foster uniform nationwide standards concerning hazardous materials" and provide "guidance to the States in adopting the Federal Hazardous Materials Regulations (49 CFR, Parts 100-199)." U.S. DEPARTMENT OF TRANSPORTATION, *STATE HAZARDOUS MATERIALS ENFORCEMENT DEVELOPMENT PROGRAM - OPERATING PLAN* at 5 (April 1981). The referenced CFR Parts contain hazardous materials regulations applicable to all modes, including rail.

These statements were entirely consistent with the concern recognized by Congress that the federal enforcement effort was grossly inadequate and state involvement would be required:

> 1 "* * *noncompliance with existing regulations is the rule rather than the exception in this dangerous business." S. Rep. No. 1192, 93d Cong., 2d Sess. 8 (1974);
>
> 2. Just 2 percent of hazardous materials shipments were being monitored—well under the 10 percent minimum. *Id.*;
>
> 3. The FRA's enforcement record had "not borne out the hope of Congress." *Id.* at 9;
>
> 4. The FRA had only employed 8 inspectors nationwide for hazardous materials enforcement—the House Committee on Interstate and Foreign Commerce "[questioned the FRA's] desire to live up to the intent of Congress." H.R. Rep. No. 1083, 93d Cong., 2d Sess. 7, *reprinted in* 1974 U.S. Code Cong. and Admin. News 7669, 7672-73. This report is noteworthy also for the fact that in a section devoted to "Hazardous Materials in Transportation," only rail issues are discussed. *Id.* at 7675-76.

The lower court ignored these statements of Congressional intent. Moreover, by failing to recognize the substantial involvement of the federal agencies in encouraging state participation in rail hazardous materials regulation, the court failed to apply the principle that the long-standing interpretation of the federal agencies empowered to enforce the federal statute at issue is entitled to great deference. *United States v. Clark*, 454 U.S. 555, 565 (1982). It was error for the lower court to give this matter no consideration whatsoever.

C. THE LOWER COURT ERRED BY IGNORING CONGRESSIONAL INTENT THAT STATES BE ACTIVE PARTICIPANTS IN RAIL HAZARDOUS MATERIALS ENFORCEMENT

Congress created two different enforcement schemes when it enacted the FRSA and then the HMTA. Under the FRSA, once a federal standard is adopted, states are preempted, but are encouraged to participate in enforcing federal standards under state/federal cooperative agreements. *See* 45 U.S.C. § 435. Indeed, in debating the FRSA, Congress early recognized that "[i]t will be the State, the unit closest to the ground, which conducts the investigation, which submits the recommendations, which finds the problem before the disaster strikes." 116 Cong. Rec. 27613 (1970) (Remarks of Rep. Pickle). H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19, *reprinted in* 1970 U.S. Code Cong. and Admin. News 4104, 4117: "* * *the valuable assistance of the States will be very much needed to carry out this act."

Thus, state involvement in enforcement of the FRSA was clearly contemplated under the auspices of state/federal cooperative agreements, whereby states agree to assist the federal government in enforcing *federal* laws and rules. By the same token, state involvement in hazardous materials enforcement was also clearly contemplated by the HMTA, through the requirement that if states adopt hazardous materials standards as *state* law, such stan-

dards must be generally consistent with federal standards. 49 U.S.C. § 1811.

The anomaly created by the lower court is based on the fact that state/federal cooperative agreements *do not apply* to enforcement of hazardous materials regulations, 49 C.F.R. §§ 212, 212.3 (Scope of cooperative agreements does not include hazardous materials) *See also* H.R. Rep. No. 1025, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. Code Cong. and Admin. News 3830, 3837-38. Thus, the lower court's application of the FRSA preemption standard would preclude state enforcement of rail hazardous materials regulations *in any manner*, the express intent of Congress to the contrary notwithstanding.

There is simply no justification for such a regulatory void, and it was error for the lower court to create one.

D. THE LOWER COURT ERRED BY FAILING TO RECONCILE THE STATUTORY SCHEMES, PARTICULARLY WHEN THERE EXISTS A SUBSTANTIAL STATE INTEREST IN LOCAL SAFETY REGULATION

The lower court violated the long-recognized principle that preemption analysis is to be tempered by the conviction that when possible, the court is to reconcile statutes, "rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). *See also Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); *Florida Lime Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

The lower court could have easily reconciled the FRSA and HMTA by recognizing that the HMTA established a dual role for the state and federal jurisdictions in the area of hazardous materials regulation for all modes of transportation, including rail. Rules adopted under the FRSA would be subject to the preemption standard in that statute, and rules adopted under the HMTA would be subject to the preemption standard in that statute. In this way, the interest in uniform regulations would have been

preserved. Moreover, to have reconciled the statutes in this way would not only have been consistent with the aforementioned principle of constitutional law, but it would have also recognized the significant and traditional state interest in regulating in the area of local safety and welfare. *See Florida Lime Growers, supra*, 373 U.S. at 144.

The lower court apparently believed that its decision "retains the essential character and purpose of both [the HMTA and the FRSA]," and did not work an ouster of the HMTA. 901 F.2d at 503. On the contrary, the lower court emasculated the role intended for the states in rail hazardous materials regulation. In effect, the lower court amended the HMTA, rendering Section 1811 inapplicable to rail hazardous materials transportation. To do so was error.

E. CASES FROM OTHER JURISDICTIONS EITHER SUPPORT OHIO'S POSITION OR ARE INCONCLUSIVE ON THE ISSUES PRESENTED

The one clear decision covering the issues in this case found that the HMTA preemption standard applied to rail hazardous materials regulations. In *Southern Pacific Transportation Co. v. Public Service Comm'n of Nevada*, No. CV-N-86-444-BRT (D.C. Nev. 1988), *rev'd on other grounds*, No. 88-15541 (9th Cir. July 18, 1990), the district court held that state rail hazardous materials regulations consistent with federal regulations were not preempted. On appeal, the Ninth Circuit agreed with this principle, but reversed on the basis that the specific state regulations at issue were not consistent with federal regulations.

Other cases in the area are less clear. For example, in *Missouri Pacific Railway Co. v. Railroad Comm'n of Texas*, 671 F. Supp. 466 (W.D. Tex. 1987), *aff'd*, 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 794 (1989), the circuit court affirmed a lower court ruling on the basis of preemption under the FRSA, apart from hazardous materials considerations, despite the lower court finding of

inconsistency with HMTA requirements. 850 F.2d at 267-268.

In *Atchison T. & S.F. Ry. Co. v. Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977), the court found the preemption standards in the FRSA and HMTA to be "redundant" and elected to apply the FRSA standard. 453 F. Supp. at 924, n. 7. Nonetheless, the court acknowledged that Illinois could obtain a non-preemption determination under the HMTA. Id. at 926. Illinois currently maintains rail hazardous materials regulations consistent with federal requirements. *See, e.g.*, ILL. ADMIN. CODE tit. 92, CH. I, § 179.

In *CSX Transp., Inc. v. City of Tullahoma*, No. CIV 4-87-47 (E.D. Tenn. Feb. 17, 1988) the court voided a local train speed ordinance. In *dictum*, the court noted that the FRSA preemption standard took priority over the HMTA preemption standard, despite the fact that the train speed ordinance had nothing to do with hazardous materials transportation.

In sum, the cases from other jurisdictions either support Ohio's position *in toto*, would nonetheless allow state hazardous materials standards consistent with federal standards, or had nothing to do with hazardous materials transportation

F. THE LOWER COURT ERRED IN APPLYING AN IMPLIED REPEAL ANALYSIS. BUT EVEN ASSUMING IMPLIED REPEAL ANALYSIS WAS APPROPRIATE, THE COURT ADOPTED AN INCORRECT STANDARD AND THEN MISAPPLIED THAT STANDARD

The lower court erred in considering this to be a case involving an "implied repeal" of the FRSA preemption standard. *See* 901 F.2d at 502. But there was simply no need for Congress to repeal the FRSA standard, either expressly or impliedly: withdrawing FRA authority over the Explosives and Other Dangerous Articles Act, 49 U.S.C. §

1655(f)(3)(A) made the FRSA preemption standard inapplicable, and further amendment unnecessary.

But even assuming, *arguendo*, that an implied repeal analysis was appropriate, the court erred in two significant respects: 1) by implying that Congress did not sufficiently "designate" the FRSA when it enacted the HMTA; and 2) by imposing such a "designation" requirement in the first place. *See* 901 F.2d at 502.

First, Congress *did* designate the FRSA when it withdrew the authority to regulate hazardous materials on a modal basis, by specifically removing the Explosives and Other Dangerous Articles Act, which had been part of the FRSA. 49 U.S.C. § 1655(f)(3)(A). There is simply no basis to conclude that the FRSA preemption provision could be carried in this legislative "baggage," given the specific preemption standard in the HMTA.

Second, even assuming the lower court was correct in stating there was no "designation" of the FRSA in the HMTA, it was error to impose such a requirement in analyzing the implied repeal issue. The Court has held that implied repeal may be evident "from the language *or operation* of a statute* * *" *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470, *reh'g denied*, 458 U.S. 1133 (1982) (emphasis added). The Court has never imposed a requirement that Congress "designate" a prior law in subsequent legislation, in order for an implied repeal to exist. The lower court erred by doing just that.

CONCLUSION

For the reasons given above, the petition for writ of certiorari filed by the Public Utilities Commission of Ohio should be granted.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

Robert E. Simpson
Assistant Attorney General
Counsel of Record

Donald T. Trotter
Assistant Attorney General

Attorneys for the State of Washington
Heritage Plaza Building
1400 S. Evergreen Park Dr. SW
Olympia, Washington 98504

Timothy M. Hogan
Chief Counsel

Attorney for the State of Arizona and the Arizona Corporation Comm'n
1200 West Washington Street
Phoenix, Arizona 85007

Janice E. Kerr
Edward W. O'Neill
James T. Quinn
Attorneys for the People of the State of California and the Public Utilities Commission of the State of California
505 Van Ness Avenue
San Francisco, California 94102

WILLIAM H. GUSTE, JR.
Attorney General
Kenneth C. DeJean
Assistant Attorney General
Attorneys for the State of Louisiana
P.O. Box 94095
Baton Rouge, Louisiana 70804

WILLIAM L. WEBSTER
Attorney General
James B. Deutsch
Chief Deputy Attorney General
Attorneys for the State of Missouri
P.O. Box 899
Supreme Court Building
Jefferson City, Missouri 65102

MARC F. RACICOT
Attorney General
Martin C. Jacobson
Special Assistant Attorney General
Attorneys for the State of Montana
2701 Prospect Avenue
Helena, Montana 59620

BRIAN MCKAY
Attorney General
Attorney for the State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710

CHARLES W. BURSON
Attorney General
Attorney for the State
of Tennessee
460 James Robertson Parkway
Nashville, Tennessee 37219

JIM MATTOX
Attorney General

Douglas Burt Fraser
Assistant Attorney General
Attorneys for the State of Texas
Supreme Court Building
14th and Colorado Streets
Austin, Texas 78701

Paul Rodgers
General Counsel

Charles D. Gray
Assistant General Counsel
Attorneys for National Association
of Regulatory Utility Commissioners
1102 ICC Building
P.O. Box 684
Washington, D.C. 20044

APPENDIX
AMICI STATES
LAWS AND RULES

Amici State	Agency	Rules (or Statute if Applicable)
Arizona	Arizona Corporation Comm'n	Pending in Docket R-0000-90-166.
California	California Public Utility Comm'n	Pending in Case No. OIR 88-07-039
Louisiana	Louisiana Public Service Comm'n	LA. REV. STAT. ANN. § 32-1504
Missouri	Missouri Division of Transportation, Dept. of Economic Develop.	MO. CODE REGS. tit. 4, § 265-8.120 (Adopts 49 CFR Parts 171-179)
Montana	Montana Public Service Comm'n	MONT. CODE ANN. § 69-14-116
Nevada	Nevada Public Service Comm'n	NEVADAADMIN.CODE Ch. 705, §§ 310-380 (Adopts 49 CFR Parts 171-174)
Tennessee	Tennessee Public Service Comm'n	TENN. COMP.R. & REGS. 1220-3-1-.04 (Adopts 49 CFR Parts 106-189)
Texas	Texas Railroad Comm'n	TEXAS ADMIN. CODE tit. 16, § 5.623 (Adopts 49 CFR Parts 171-179)
Washington	Washington Utilities & Transportation Comm'n	WASH. ADMIN. CODE §480-62-090 (Adopts 49 CFR Parts 171-174, 178-179)

STATUTES INVOLVED

HMTA Preemption Standard, 49 U.S.C.§ 1811:

General

(a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

State laws

(b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

Other federal laws

(c) The provisions of this chapter shall not apply to pipelines which are subject to regulation under the Natural Gas Pipeline Safety Act of 1968 (section 1671 et seq. of this title) or to pipelines which are subject to regulation under Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C.A. § 2001 et seq.) [49 U.S.C. §1811].

FRSA Preemption Standard, 45 U.S.C. § 434:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Explosive and Other Dangerous Articles Act, 49 U.S.C. § 1655(f)(3)(A) (repealed 1983):

> The Federal Railroad Administrator shall carry out the functions, powers, and duties of the Secretary pertaining to railroad safety as set forth in the statutes transferred to the Secretary by subsection (e) of this section (other than subsection (e)(4) of this section).

49 U.S.C. § 1655(e)(4) is the section that transfers to the Secretary:

> * * *the following provisions of law relating generally to explosives and other dangerous articles: Sections 831-835 of Title 18.